COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

CASE OF DEMİR AND BAYKARA v. TURKEY

(Application no. 34503/97)

JUDGMENT

STRASBOURG

12 November 2008

This judgment is final but it may be subject to editorial revision.

In the case of Demir and Baykara v. Turkey,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Christos Rozakis, *President*,
Nicolas Bratza,
Françoise Tulkens,
Josep Casadevall,
Giovanni Bonello,
Rıza Türmen,
Kristaq Traja,
Boštjan M. Zupančič,
Vladimiro Zagrebelsky,
Stanislav Pavlovschi,
Lech Garlicki,
Alvina Gyulumyan,
Ljiljana Mijović,
Dean Spielmann,
Ján Šikuta,
Mark Villiger,
Päivi Hirvelä, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 16 January 2008 and 15 October 2008,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 34503/97) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Turkish nationals, Mr Kemal Demir and Mrs Vicdan Baykara ("the applicants"), the latter in her capacity as president of the trade union Tüm Bel Sen, on 8 October 1996.

2. The applicants were represented by Mr S. Karaduman, a lawyer practising in Ankara. The Turkish Government ("the Government") were represented by their Co-Agent, Mrs Deniz Akçay.

3. The applicants complained that, in breach of Article 11 of the Convention, by itself or in conjunction with Article 14, that the domestic courts had denied them, first, the right to form trade unions and, second, the right to engage in collective bargaining and enter into collective agreements.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 23 September 2004 the Chamber declared the application partly admissible and partly inadmissible.

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1)

8. On 21 November 2006 the Chamber, consisting of J.-P. Costa, President, I. Cabral Barreto, R. Türmen, M. Ugrekhelidze, A. Mularoni, E. Fura-Sandström, D. Popović, judges, and S. Dollé, Section Registrar, delivered its judgment. It held, unanimously, that there had been a violation of Article 11 of the Convention in so far as the domestic courts had refused to recognise the legal personality of the trade union Tüm Bel Sen and had considered null and void the collective agreement between that trade union and Gaziantep Municipal Council, and that there was no need for a separate examination of the complaints under Article 14 of the Convention. The concurring opinion of Mr Türmen, Mrs Fura-Sandström and Mr Popović was annexed to that judgment.

9. On 21 February 2007 the Government requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention and Rule 73.

10. A panel of the Grand Chamber granted that request on 23 May 2007.

11. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

12. The applicants and the Government each filed a memorial.

13. A hearing took place in public in the Human Rights Building, Strasbourg, on 16 January 2008 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mrs D. AKÇAY, *Co-Agent*,
Mrs E. DEMIR,
Mrs Z.G. ACAR,
Mrs İ. ALTINTAŞ,
Mrs E. ESIN,
Mrs Ö. GAZIALEM,
Mr K. AFŞIN,
Mr L. SAVRAN, *Advisers*;

(b) *for the applicants*
Mrs V. BAYKARA, applicant and president of the trade union Tüm Bel Sen,
Mrs S. KARADUMAN, of the Ankara Bar.

The Court heard addresses by Mrs S. Karaduman, Mrs V. Baykara and Mrs D. Akçay.

THE FACTS

14. The applicants, Kemal Demir and Vicdan Baykara, were born in 1951 and 1958 and live in Gaziantep and Istanbul respectively. The first applicant was a member of the trade union Tüm Bel Sen and the second applicant was its president.

I. THE CIRCUMSTANCES OF THE CASE

15. The trade union Tüm Bel Sen was founded in 1990 by civil servants from various municipalities whose employment was governed by the Public Service Act (Law no. 657). Under Article 2 of its constitution, the union's objective is to promote democratic trade unionism and thereby assist its members in their aspirations and claims. Its head office is located in Istanbul.

16. On 27 February 1993 Tüm Bel Sen entered into a collective agreement with the Gaziantep Municipal Council for a period of two years effective from 1 January 1993. The agreement concerned all aspects of the working conditions of the Gaziantep Municipal Council's employees, such as salaries, allowances and welfare services.

17. As the Gaziantep Municipal Council had failed to fulfil certain of its obligations under the agreement, in particular financial obligations, the second applicant, as president of the union, brought civil proceedings against it in the Gaziantep District Court (the "District Court") on 18 June 1993.

18. In a judgment of 22 June 1994 the District Court found in favour of Tüm Bel Sen. The Gaziantep Municipal Council appealed on points of law.

19. On 13 December 1994 the Court of Cassation (Fourth Civil Division) quashed the District Court's judgment. It found that, even though there was no legal bar preventing civil servants from forming a trade union, any union so formed had no authority to enter into collective agreements as the law stood.

20. In arriving at this conclusion, the Court of Cassation took into account the special relationship between civil servants and the public

administration as regards recruitment, the nature and scope of the work concerned, and the privileges and guarantees afforded to officials by virtue of their status. It considered that this relationship was different from that which existed between employers and ordinary contractual staff (that is to say, employees in the private sector together with manual workers employed by a public administration). As a result, Law no. 2322, governing collective agreements and the right to take strike or lock-out action, could not apply to relations between civil servants and a public administration. Any agreement of a "collective" nature between civil servants' unions and a public administration had to be grounded in specific legislation.

21. In a judgment of 28 March 1995 the Gaziantep District Court stood by its original judgment on the ground that, despite the lack of express statutory provisions recognising a right for trade unions formed by civil servants to enter into collective agreements, this lacuna had to be filled by reference to international treaties such as the conventions of the International Labour Organisation which had already been ratified by Turkey and which, by virtue of the Constitution, were directly applicable in domestic law.

22. Among other things the District Court indicated, firstly, that the trade union Tüm Bel Sen was a legally-established entity which had filed its constitution with the provincial governor's office a long time before and which, since then, had carried on its activities without the slightest intervention by the competent authorities. The court added that, on this matter, there was no discrepancy between its judgment and that of the Fourth Civil Division of the Court of Cassation.

23. As regards the right of civil servants to enter into collective agreements, the court considered that, even if there was an omission in Turkish law on this point, the court to which a dispute was referred had an obligation, under Article 1 of the Civil Code, to make good the omission itself and to adjudicate the case. In the court's view, the same obligation also arose from Article 36 of the Constitution, under which everyone was afforded the right of access to a court. In this context the relevant provisions of the ILO international labour conventions ratified by Turkey had to be applied in the case, even though the specific national laws had not yet been enacted by the legislature. Directly applying the relevant provisions of these international instruments ratified by Turkey, the court considered that the applicant trade union did have the right to enter into collective agreements.

24. As to the question whether the validity of the collective agreement in question was affected by the fact that it had not been provided for by any legislation at the time it was entered into, the court considered that, since it concerned employer-employee relations, the agreement was of a private-law nature. In the context of the limits imposed by Articles 19 and 20 of the Code of Obligations, namely compliance with statutory provisions, customary law, morals and public order, the parties had been freely entitled

to determine the content of this collective agreement. An examination of the text of the collective agreement in question did not reveal any contradiction with those requirements. Consequently, the court found that the collective agreement between the applicant union and the Gaziantep Municipal Council had been a valid legal instrument with binding effect for the parties.

25. The court awarded Mr Kemal Demir a sum equivalent to the increases in pay and allowances provided for by the collective agreement in question.

26. In a judgment of 6 December 1995 the Court of Cassation (combined civil divisions) quashed the District Court's judgment of 28 March 1995. It found that certain rights and freedoms mentioned in the Constitution were directly applicable to litigants, whereas others were not. In fact, the Constitution, by the indication "the exercise of this right shall be governed by legislation" clearly earmarked the rights and freedoms which, to be used and applied, required the enactment of specific legislation. Absent such legislation, these rights and freedoms, which included the freedom to join a trade union and to bargain collectively, could not be exercised.

27. The Court of Cassation further considered that the principle of the individual's free will was not absolute in respect of the establishment of legal entities. They could acquire legal personality, distinct from their constituent persons, only by complying with the formal conditions and procedures laid down by law for that purpose. The creation of a legal entity was no more than a legal consequence conferred by the law on an expression of free will by the founders.

28. The Court of Cassation pointed out that the freedom to form associations, unions and political parties, even if provided for in the Constitution, could not be exercised simply by a declaration of the free will of individuals. As there was no specific law on the subject, the existence of such a legal entity could not be recognised. According to the Court of Cassation, this finding was not at odds with the principles of "the rule of law" and "democracy" mentioned in the Constitution, since supervision of legal entities by the State, in order to ensure public usefulness, was necessary in any democratic legal system.

29. The Court of Cassation further pointed out that the legislation in force at the time when the trade union was founded did not permit civil servants to form trade unions. It added that the amendments subsequently made to the Constitution, recognising the right of civil servants to form trade unions and bargain collectively, were not such as to invalidate the finding that Tüm Bel Sen had not acquired legal personality and, as a result, did not have the capacity to take or defend court proceedings.

30. An application by representatives of the trade union for rectification of that decision was rejected by the Court of Cassation on 10 April 1996.

31. Following an audit of the Gaziantep Municipal Council's accounts by the Audit Court, the members of the union Tüm Bel Sen had to reimburse the additional income they had received as a result of the defunct collective agreement. The Audit Court, in a number of decisions that it gave as the court of last resort in respect of the collective agreements entered into by the trade union, pointed out that the rules applicable to civil servants, including the salaries and allowances to which they were entitled, were laid down by law. It further considered that, since the amendment on 23 July 1995 of Article 53 of the Constitution and the enactment on 25 June 2001 of Law no. 4688 on civil servants' trade unions, such unions were admittedly entitled to engage in collective bargaining under certain conditions of representation, but were not entitled to enter into valid collective agreements directly with the authorities concerned, unlike trade unions of ordinary contractual employees who could enter into such agreements with their employers. If an agreement was entered into between the employing authority and the union concerned, it could only become binding following its approval by the Council of Ministers. The Audit Court, after finding that the collective agreement entered into by the applicant union had not fulfilled these conditions, decided that the accountants who had authorised higher payments than those provided for by law should reimburse the surplus amounts to the State's budget.

32. The Audit Court refused to apply section 4 of Law no. 4688, which required the discontinuance of any administrative, financial or judicial proceedings brought against accountants who were responsible for such payments. It considered that this provision did not render the collective agreements valid and did not release the accountants in question from the obligation to reimburse the State for any losses sustained by it as a result of payments made in accordance with those agreements.

33. The accountants concerned in turn brought proceedings against the civil servants who were members of the unions and had benefited from the additional payments granted under the defunct collective agreements.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. Domestic law

34. The relevant provisions of the Turkish Constitution read as follows:

Article 51
(at the material time)

"Ordinary contractual employees (*işçi*) and employers shall have the right to form trade unions and federations of unions, without prior permission, in order to safeguard

and develop their economic and social rights and interests in the context of their labour relations.

In order to form a union or a federation of unions, it shall suffice to submit the information and documents prescribed by law to the competent authority designated by law. If it finds that this information and documentation are not in conformity with the law, the competent authority shall apply to the appropriate court for the suspension of activities or the dissolution of the union or federation of unions.

Everyone shall be entitled to join or resign from a trade union.

No one shall be compelled to become a member, remain a member, or resign from a trade union.

Ordinary contractual employees and employers shall not be entitled to join more than one trade union at a time.

Employment in a particular workplace shall not be made conditional on membership or lack of membership of a trade union of ordinary contractual employees.

In order to hold an executive post in a trade union or federation of trade unions of ordinary contractual employees, it is necessary to have effectively been employed as such an employee for at least ten years.

The constitution, administration, and functioning of trade unions and federations of trade unions shall not be inconsistent with the characteristics of the Republic or with democratic principles as defined in the Constitution."

Article 51
(as amended by Law no. 4709 of 3 October 2001)

"Employees and employers shall have the right to form trade unions and federations of unions, without prior permission, in order to safeguard and develop the economic and social rights and interests of their members in the context of their labour relations, and to join or withdraw from such entities of their own free will. No one shall be compelled to join or resign from a trade union.

The right to form a union may only be limited as prescribed by law in the interests of national security or public order, for the prevention of crime, for the protection of public health or morals or for the protection of the rights and freedoms of others.

The formalities, conditions and procedures applicable to the right to form a trade union shall be prescribed by law.

Membership of more than one trade union within the same sector of activity shall be prohibited.

The scope of the rights in this sphere of public officials other than those who have the status of ordinary contractual employee, and the exceptions and limitations applicable to them, shall be prescribed by law in a manner appropriate to the nature of the services they provide.

The constitution, administration and functioning of trade unions and federations of unions shall not be inconsistent with the fundamental characteristics of the Republic or with democratic principles."

Article 53
(at the material time)

"Ordinary contractual employees and employers shall be entitled ... to enter into collective agreements in order to regulate their economic and social position and conditions of work.

Collective agreements shall be entered into in accordance with the statutory procedure.

It shall be prohibited to enter into or apply more than one collective agreement in a single workplace at any given time."

Article 53
(as amended by Law no. 4121 of 23 July 1995)

"Ordinary contractual employees and employers shall be entitled ... to enter into collective agreements in order to regulate their economic and social position and conditions of work.

Collective agreements shall be entered into in accordance with the statutory procedure.

The trade unions and federations of unions which the public officials referred to in the first paragraph of Article 128 shall be entitled to form and which do not fall within the scope of the first and second paragraphs of the present Article, nor that of Article 54, shall be entitled to take or defend court proceedings and to bargain collectively with the public administration in accordance with their objectives and on behalf of their members. If an agreement is reached as a result of collective bargaining, the text of the agreement shall be signed by the parties. This text shall be submitted to the Council of Ministers so that legal or administrative arrangements can be made for its implementation. If no such agreement is reached through collective bargaining, a record of the points of agreement and disagreement shall be drawn up and signed by the relevant parties and submitted for consideration by the Council of Ministers. The procedure for the implementation of this paragraph shall be laid down by law.

It shall be prohibited to enter into or apply more than one collective agreement in a single workplace at any given time."

Article 90

"... International treaties that are duly in force are directly applicable in domestic law. Their constitutionality cannot be challenged in the Constitutional Court.

In the event of conflict as to the scope of fundamental rights and freedoms between an international agreement duly in force and a domestic statute, the provisions of the

international agreement shall prevail." (Second sub-paragraph added by Law no. 5170 of 7 May 2004)

Article 128

"The essential and permanent duties necessitated by the public services that the State, public economic undertakings and other public-law entities are required to provide, in accordance with general principles of public administration, shall be performed by civil servants and other public officials.

The qualifications, appointment, duties and powers, rights and responsibilities, and salaries and allowances of civil servants and other public officials, and other matters related to their status, shall be provided for by law.

The procedure and principles governing the training of senior civil servants shall be specially provided for by law."

35. Section 22 of the Public Service Act (Law no. 657 of 14 July 1965) stated that civil servants were authorised to form and join trade unions and professional organisations, in accordance with the conditions set out in special legislation. The second subsection of that provision stated that the said professional organisations were authorised to defend the interests of their members before the competent authorities.

Section 22 was repealed by Article 5 of Legislative Decree no. 2 of 23 December 1972. It was reinstated by section 1 of Law no. 4275 of 12 June 1997. The text now reads:

"In accordance with the provisions of the Constitution and of the special legislation, civil servants shall be permitted to form and to become members of trade unions and federations of trade unions."

36. The Civil Servants' Trade Union Act (Law no. 4688 – which was enacted on 25 June 2001 and entered into force on 12 July 2001) applies, according to section 2, to public officials, other than those who have the status of ordinary contractual employee, working for Government agencies and other public-law entities providing a public service, organisations operating on a general, supplementary or special budget, public administrations and municipal authorities in provinces and services attached thereto, publicly owned enterprises, banks and other private-law undertakings and establishments attached thereto, and for all other public organisations and establishments.

Section 30 of the Act provides as follows:

"The trade union with the greatest number of members in each branch of public administration and the federations to which those unions are affiliated shall have the capacity to bargain collectively. The delegate from the most representative trade union shall chair the delegation taking part in the negotiations."

The determination of which civil servants' trade unions and federations are competent to bargain collectively is made by the Minister for Labour

and Social Security on the basis of lists that are co-signed and presented by the public administrations and the trade unions (section 30 of Law no. 4688).

During the collective bargaining, the employer is represented by the Public Employers' Committee. Civil Servants and other public officials are represented by the trade union that is recognised as competent and the federation to which it is affiliated.

The Public Employers' Committee and the trade unions and federations concerned are required to meet on 15 August every year. The parties then submit their proposals, which will form the starting-point and agenda of the collective bargaining. The principles governing the negotiations are determined by the parties (section 32 of Law no. 4688).

The collective negotiations must be concluded within fifteen days. If agreement is reached within that time, the parties concerned sign a collective agreement which is sent to the Council of Ministers to enable the legal and administrative steps required for its implementation to be taken. The Council of Ministers takes the appropriate measures within a period of three months and presents its draft law to the Grand National Assembly of Turkey (section 34 of Law no. 4688).

If the parties concerned are unable to reach an agreement within the time-limit thus fixed, each one may refer the matter to the Arbitral Board, which is made up of academics who are not members of political parties. If the parties approve the decision of the Arbitral Board, an agreement is signed and sent to the Council of Ministers. If there is still no agreement, the parties sign a record indicating the points on which they have agreed and disagreed. This record is also sent to the Council of Ministers (section 35 of Law no. 4688).

B. International Law

1. Universal instruments

(a) Right to organise and civil servants

37. Article 2 of Convention No. 87 of the International Labour Organisation (ILO) on Freedom of Association and Protection of the Right to Organise (adopted in 1948 and ratified by Turkey on 12 July 1993) provides as follows:

> "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."

38. In its Individual Observation to the Turkish Government concerning Convention No. 87, adopted in 2005, the Committee of Experts on the Application of Conventions and Recommendations stated as follows:

> "The Committee underlines that Article 2 of the Convention provides that workers without distinction whatsoever should have the right to form and join organizations of their own choosing and that the only admissible exception under the Convention concerns the armed forces and the police. ..."[1]

39. The ILO Committee on Freedom of Association declared as follows concerning municipal civil servants (see Digest of Decisions 1996, paragraph 217):

> "Local public service employees should be able effectively to establish organizations of their own choosing, and these organizations should enjoy the full right to further and defend the interests of the workers whom they represent." [2]

40. Article 22 of the International Covenant on Civil and Political Rights provides as follows:

> "1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
>
> 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right."

41. Article 8 of the International Covenant on Economic, Social and Cultural Rights provides as follows:

> "1. The States Parties to the present Covenant undertake to ensure:
>
> (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
>
> ...
>
> (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the

1. http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=7872&chapter=6&query=Turkey%40ref&highlight=&querytype=bool&context=0
2. http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=77&chapter=23&query=1996&highlight=on&querytype=bool&context=0

interests of national security or public order or for the protection of the rights and freedoms of others;

...

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State."

(b) Collective bargaining law and civil servants

42. The relevant articles of ILO Convention No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (adopted in 1949 and ratified by Turkey on 3 January 1952) read as follows:

Article 4

"Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

Article 5

"1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention."

Article 6

"This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way."

43. The ILO's Committee of Experts interpreted this provision as excluding from the scope of the Convention only those officials who are directly employed in the administration of the State. With that exception, all other persons employed by the government, by public enterprises or by autonomous public institutions should benefit, according to the Committee, from the guarantees provided for in Convention No. 98 in the same manner as other employees, and consequently should be able to engage in collective bargaining in respect of their conditions of employment, including wages

(*General Survey 1994, freedom of association and collective bargaining, on Conventions No. 87 and No. 98* [ILO, 1994a], § 200).

44. The relevant provisions of ILO Convention No. 151 (adopted in 1978 and ratified by Turkey on 12 July 1993) concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service read as follows:

Article 1

"1. This Convention applies to all persons employed by public authorities, to the extent that more favourable provisions in other international labour Conventions are not applicable to them.

2. The extent to which the guarantees provided for in this Convention shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature, shall be determined by national laws or regulations.

3. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations."

Article 7

"Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters."

The General Conference of the International Labour Organisation, in the preamble to Convention No. 151, noted "the terms of the Freedom of Association and Protection of the Right to Organise Convention, 1948, [and] the Right to Organise and Collective Bargaining Convention, 1949" and took into account:

"the particular problems arising as to the scope of, and definitions for the purpose of, any international instrument, owing to the differences in many countries between private and public employment, as well as the difficulties of interpretation which have arisen in respect of the application of relevant provisions of the Right to Organise and Collective Bargaining Convention, 1949, to public servants, and the observations of the supervisory bodies of the ILO on a number of occasions that some governments have applied these provisions in a manner which excludes large groups of public employees from coverage by that Convention".

2. European instruments

(a) Right to organise and civil servants

45. Article 5 of the European Social Charter (revised), not yet ratified by Turkey, provides as follows:

Article 5 - The right to organise

> "With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this Article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations."

46. Principle no. 8 of Recommendation No. R (2000) 6 of the Committee of Ministers of the Council of Europe on the status of public officials in Europe reads as follows:

> "Public officials should, in principle, enjoy the same rights as all citizens. However, the exercise of these rights may be regulated by law or through collective agreement in order to make it compatible with their public duties. Their rights, particularly political and trade union rights, should only be lawfully restricted in so far as it is necessary for the proper exercise of their public functions."

47. Article 12(1) of the European Union's Charter of Fundamental Rights provides as follows:

> "Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests."

48. As to European practice, it can be observed that the right of public servants to join trade unions is now recognised by all Contracting States. This right applies to public servants under a career or contractual system and to employees of publicly owned industrial or commercial enterprises, whether national or municipal. Civil servants, whether they work for central government or a local authority, are generally entitled to join the trade union of their choosing. The density of trade-union membership is generally higher in the public sector than in the private sector, which constitutes a manifest indication of a favourable legal and administrative environment created by member States. In the majority of member States, the few restrictions that can be found are limited to judicial offices, to the police and to the fire services, with the most stringent restrictions, culminating in the prohibition of union membership, being reserved for members of the armed forces.

(b) The right to bargain collectively and civil servants

49. Article 6 of the European Social Charter (revised), not yet ratified by Turkey, contains the following provision concerning the right to bargain collectively:

> "With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:
>
> 1. to promote joint consultation between workers and employers;
>
> 2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
>
> 3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;
>
> and recognise:
>
> 4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."

50. According to the meaning attributed by the Charter's Committee of Independent Experts (now the European Committee of Social Rights – ECSR) to Article 6 § 2 of the Charter, which in fact fully applies to public officials, States which impose restrictions on collective bargaining in the public sector have an obligation, in order to comply with this provision, to arrange for the involvement of staff representatives in the drafting of the applicable employment regulations (see, for example, in respect of Germany, Conclusions III, pp. 34-35).

51. Article 28 of the European Union's Charter of Fundamental Rights provides as follows:

Right of collective bargaining and action

> "Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

52. As to the practice of European States, it can be observed that, in the vast majority of them, the right for public servants to bargain collectively with the authorities has been recognised, subject to various exceptions so as to exclude certain areas (disciplinary procedures, pensions, medical insurance, wages of senior civil servants) or certain categories of civil servants who hold exclusive powers of the State (members of the armed forces and of the police, judges, diplomats, career civil servants at federal

level). The right of public servants working for local authorities and not holding State powers to engage in collective bargaining in order to determine their wages and working conditions has been recognised in the vast majority of Contracting States. The remaining exceptions can be justified by particular circumstances.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

53. The Government raised two objections to admissibility before the Grand Chamber: one to the effect that it was impossible to rely against them on international instruments other than the Convention, particularly instruments that Turkey had not ratified; and the other to the effect that Article 11 of the Convention was not applicable to the applicants as they were civil servants and not ordinary contractual employees.

54. As to the first objection, the Government contended that the Court, by means of an interpretation of the Convention, could not create for Contracting States new obligations that were not provided for in the Convention. In particular, considering that the Chamber had attached great importance to the European Social Charter (Articles 5 and 6 of which had not been ratified by Turkey) and to the case-law of its supervisory organ, they requested the Grand Chamber to declare the application inadmissible as being incompatible *ratione materiae* with the Convention, in view of the impossibility of relying against the Government on international instruments that Turkey had not ratified.

55. As to the second objection, the Government, relying for the most part on the restriction provided for in the last sentence of Article 11 of the Convention in respect of the applicability of this provision to "members ... of the administration of the State", argued that Turkish civil servants, including municipal civil servants, were covered by a specific and highly detailed set of legal rules under the Public Service Act (Law no. 657), thus being distinguished from other employees. The Government requested the Court to dismiss the application as being incompatible *ratione materiae* with the provisions of Article 11.

56. The applicants disputed the objections submitted by the Government.

57. The Court observes that the Government's objection to the Court's consideration of the European Social Charter cannot be regarded as a preliminary objection. Even supposing that the Government's objection was well-founded, an application does not become inadmissible solely by the

effect of instruments in the light of which a Section of the Court has assessed its merits. In reality, this objection by the Government relates more to the examination of the substantive questions raised by the case and will be dealt with in that context.

58. As to the objection concerning the scope of the Convention *ratione materiae*, the Court first observes that the Government are not estopped from raising it since they submitted before the Chamber, prior to the examination of admissibility, an essentially similar argument. That being said, the Court notes that, even if there had been estoppel, it could not have avoided examining this issue, which goes to its jurisdiction, the extent of which is determined by the Convention itself, in particular by Article 32, and not by the parties' submissions in a particular case (see, *mutatis mutandis*, *Blečić v. Croatia* [GC], no. 59532/00, §§ 63-69, ECHR 2006-....).

This objection by the Government nevertheless requires the Court to examine the notion of "members ... of the administration of the State", which appears in the last sentence of Article 11. The Court therefore finds it appropriate to join it to the merits.

II. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

59. The applicants complained that the domestic courts had denied them the right to form trade unions and to enter into collective agreements. In this connection they relied on Article 11 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

A. Interpretation of the Convention in the light of other international instruments

60. The Court decided above to examine at the merits stage the Government's submission to the effect that, in adjudicating a case, it was impossible to rely against Turkey on international instruments other than the Convention, particularly instruments that Turkey had not ratified. As it relates more to the methodology to be adopted in an examination of the

merits of the complaints submitted under Article 11 of the Convention, the Court considers it necessary to dispose of this submission before turning to any other question.

1. Parties' submissions

(a) The Government

61. The Government argued that the Court was not entitled to create, by way of interpretation, any new obligations not already provided for in the Convention. They contended, among other submissions, that an international treaty to which the party concerned had not acceded, could not be relied upon against it. Whilst the Government accepted that the Court had always taken into account, when necessary, "any relevant rules of international law applicable in the relations between the parties" (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI), they considered that this approach was only legitimate if it complied with the criteria set out in Article 31 § 3 of the Vienna Convention on the Law of Treaties, and in particular, if account was taken only of those instruments by which the State concerned was bound.

62. Turkey was not a party to Article 5 (the right to organise) or Article 6 (the right to bargain collectively) of the European Social Charter, which it ratified in 1989. An interpretation that rendered these provisions binding on an indirect basis was even more problematic where, as in the present case, the absence in the Convention of an express provision guaranteeing the right to enter into collective agreements was counterbalanced by consideration of other instruments to which the State concerned was not a party.

(b) The applicants

63. The applicants criticised the manner in which the Government had raised the question concerning interpretation of the Convention. They pointed out that the Chamber had not applied the above-mentioned provisions of the Social Charter in the present case, but that it had taken into account, in its interpretation of Article 11 of the Convention, an opinion of the Committee of Independent Experts concerning the connection between the right to organise and collective bargaining.

2. The Chamber

64. The Chamber did not have cause to rule on the objection in question. It referred, as a supplementary argument, to the opinion of the Social Charter's Committee of Independent Experts when pointing out the organic link between freedom of association and freedom to bargain collectively (Chamber judgment, § 35). In its judgment, the Chamber used references to

conventions of the International Labour Organisation (ILO) in assessing whether the impugned measure was necessary in a democratic society, and in particular whether the trade union Tüm Bel Sen had been acting in good faith when it chose collective bargaining as a means to defend its members' interests (ibid., § 46).

3. The practice of interpreting Convention provisions in the light of other international texts and instruments

(a) Basis

65. In order to determine the meaning of the terms and phrases used in the Convention, the Court is guided mainly by the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (see, for example, *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18; *Johnston and Others v. Ireland*, 18 December 1986, §§ 51 et seq., Series A no. 112; *Lithgow and Others v. the United Kingdom*, 8 July 1986, §§ 114 and 117, Series A no. 102; and *Witold Litwa v. Poland*, no. 26629/95, §§ 57-59, ECHR 2000-III). In accordance with the Vienna Convention the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn (see *Golder*, cited above, § 29; *Johnston and Others*, cited above, § 51; and Article 31 § 1 of the Vienna Convention). Recourse may also be had to supplementary means of interpretation, either to confirm a meaning determined in accordance with the above steps, or to establish the meaning where it would otherwise be ambiguous, obscure, or manifestly absurd or unreasonable (Article 32 of the Vienna Convention; see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008-....).

66. Since the Convention is first and foremost a system for the protection of human rights, the Court must interpret and apply it in a manner which renders its rights practical and effective, not theoretical and illusory. The Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see, among other authorities, *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, §§ 47-48, ECHR 2005-X).

67. In addition, the Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (see *Saadi*, cited above, § 62; *Al-Adsani*, cited above, § 55; and *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 150, ECHR 2005-VI; see also Article 31 § 3 (c) of the Vienna Convention).

68. The Court further observes that it has always referred to the "living" nature of the Convention, which must be interpreted in the light of present-day conditions, and that it has taken account of evolving norms of national and international law in its interpretation of Convention provisions (see *Soering v. the United Kingdom*, 7 July 1989, § 102, Series A no. 161; *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-VIII; and *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I).

(b) Diversity of international texts and instruments used for the interpretation of the Convention

(i) General international law

69. The precise obligations that the substantive provisions of the Convention impose on Contracting States may be interpreted, firstly, in the light of relevant international treaties that are applicable in the particular sphere (thus, for example, the Court has interpreted Article 8 of the Convention in the light of the United Nations Convention of 20 November 1989 on the Rights of the Child and the European Convention on the Adoption of Children of 24 April 1967 – see *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, §§ 139 and 144, ECHR 2004-V; and *Emonet and Others v. Switzerland*, no. 39051/03, §§ 65-66, ECHR 2007-...).

70. In another case where reference was made to international treaties other than the Convention, the Court, in order to establish the State's positive obligation concerning "the prohibition on domestic slavery" took into account the provisions of universal international conventions (the ILO Forced Labour Convention, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, and the International Convention on the Rights of the Child – see *Siliadin v. France*, no. 73316/01, §§ 85-87, ECHR 2005-VII). After referring to the relevant provisions of these international instruments, the Court considered that limiting the question of compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective (ibid. § 89).

71. Moreover, as the Court indicated in the *Golder* case (cited above, § 35), the relevant rules of international law applicable in the relations between the parties also include "general principles of law recognized by civilized nations" (see Article 38 § 1 (c) of the Statute of the International Court of Justice). The Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that "the Commission and the Court [would] necessarily [have to] apply such principles" in the execution of their duties and thus considered it to be "unnecessary" to insert a specific clause to this effect in the Convention (Documents of the Consultative

Assembly, working papers of the 1950 session, Vol. III, no. 93, p. 982, para. 5).

72. In the *Soering* judgment (cited above), the Court took into consideration the principles laid down by texts of universal scope in developing its case-law concerning Article 3 of the Convention in respect of extradition to third countries. Firstly, it considered, with reference to the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights, that the prohibition of treatment contrary to Article 3 of the Convention had become an internationally accepted standard. Secondly, it considered that the fact that the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibited the extradition of a person to another State where he would be in danger of being subjected to torture did not mean that an essentially similar obligation was not already inherent in the general terms of Article 3 of the European Convention.

73. Furthermore, the Court found in its *Al-Adsani* judgment, with reference to universal instruments (Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, Articles 2 and 4 of the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment) and their interpretation by international criminal courts (judgment of the International Criminal Tribunal for the Former Yugoslavia in *Furundzija*, 10 December 1998) and domestic courts (judgment of the House of Lords in the case of *ex parte Pinochet (No. 3)*), that the prohibition of torture had attained the status of a peremptory norm of international law, or *jus cogens*, which it incorporated into its case-law in this sphere (*Al-Adsani*, cited above, § 60).

(ii) Council of Europe instruments

74. In a number of judgments the Court has used, for the purpose of interpreting the Convention, intrinsically non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly (see, among other authorities, *Öneryıldız v. Turkey* [GC], no. 48939/99, §§ 59, 71, 90 and 93, ECHR 2004-XII).

75. These methods of interpretation have also led the Court to support its reasoning by reference to norms emanating from other Council of Europe organs, even though those organs have no function of representing States Parties to the Convention, whether supervisory mechanisms or expert bodies. In order to interpret the exact scope of the rights and freedoms guaranteed by the Convention, the Court has, for example, made use of the work of the European Commission for Democracy through Law or "Venice Commission" (see, among other authorities, *Russian Conservative Party of Entrepreneurs and Others v. Russia*, nos. 55066/00 and 55638/00, §§ 70-73,

ECHR 2007-...; *Basque Nationalist Party – Iparralde Regional Organisation v. France*, no. 71251/01, §§ 45-52, ECHR 2007-...; and *Çiloğlu and Others v. Turkey*, no. 73333/01, § 17, 6 March 2007) of that of the European Commission against Racism and Intolerance (see, for example, *Bekos and Koutropoulos v. Greece*, no. 15250/02, §§ 33-36, ECHR 2005-... ; *Ivanova v. Bulgaria*, no. 52435/99, §§ 65-66, ECHR 2007-...; *Cobzaru v. Romania*, no. 48254/99, §§ 49-50, 26 July 2007; and *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, §§ 59-65, 184, 192, 200 and 205, ECHR 2007-...) and of the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (see, for example, *Aerts v. Belgium*, 30 July 1998, § 42, *Reports of Judgments and Decisions* 1998-V; *Slimani v. France*, no. 57671/00, §§ 22 et seq., ECHR 2004-IX; *Nazarenko v. Ukraine*, no. 39483/98, §§ 94-102, 29 April 2003; *Kalashnikov v. Russia*, no. 47095/99, § 97, ECHR 2002-VI; and *Kadiķis v. Latvia (no. 2)*, no. 62393/00, § 52, 4 May 2006).

(iii) Consideration by the Court

76. The Court recently confirmed, in the *Saadi v. the United Kingdom* judgment (cited above, § 63), that when it considers the object and purpose of the Convention provisions, it also takes into account the international law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty.

77. By way of example, in finding that the right to organise had a negative aspect which excluded closed-shop agreements, the Court considered, largely on the basis of the European Social Charter and the case-law of its supervisory organs, together with other European or universal instruments, that there was a growing measure of agreement on the subject at international level (see *Sigurður A. Sigurjónsson v. Iceland*, 30 June 1993, § 35, Series A no. 264; and *Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, §§ 72-75, ECHR 2006-...).

78. The Court observes in this connection that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.

79. Thus, in the *Marckx v. Belgium* case, concerning the legal status of children born out of wedlock, the Court based its interpretation on two international conventions of 1962 and 1975 that Belgium, like other States Parties to the Convention, had not yet ratified at the time (*Marckx v. Belgium*, 13 June 1979, §§ 20 and 41, Series A no. 31). The Court

considered that the small number of ratifications of these instruments could not be relied on in opposition to the continuing evolution of the domestic law of the great majority of the member States, together with the relevant international instruments, towards full juridical recognition of the maxim "*mater semper certa est*".

80. Moreover, in the cases of *Christine Goodwin v. the United Kingdom* ([GC], no. 28957/95, ECHR 2002-VI), *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, ECHR 2007-...) and *Sørensen and Rasmussen v. Denmark* (cited above), the Court was guided by the European Union's Charter of Fundamental Rights, even though this instrument was not binding. Furthermore, in the cases of *McElhinney v. Ireland* ([GC], no. 31253/96, ECHR 2001-XI), *Al-Adsani v. the United Kingdom* (cited above) and *Fogarty v. the United Kingdom* ([GC], no. 37112/97, ECHR 2001-XI), the Court took note of the European Convention on State Immunity, which had only been ratified at the time by eight member States.

81. In addition, in its *Glass v. the United Kingdom* judgment, the Court took account, in interpreting Article 8 of the Convention, of the standards enshrined in the Oviedo Convention on Human Rights and Biomedicine of 4 April 1997, even though that instrument had not been ratified by all the States parties to the Convention (see *Glass v. the United Kingdom*, no. 61827/00, § 75, ECHR 2004-II).

82. In order to determine the criteria for State responsibility under Article 2 of the Convention in respect of dangerous activities, the Court, in the *Öneryıldız v. Turkey* judgment, referred among other texts to the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (ETS no. 150 – Lugano, 21 June 1993) and the Convention on the Protection of the Environment through Criminal Law (ETS no. 172 – Strasbourg, 4 November 1998). The majority of member States, including Turkey, had neither signed nor ratified these two Conventions (see *Öneryıldız*, cited above, § 59).

83. In the *Taşkın and Others v. Turkey* case, the Court built on its case-law concerning Article 8 of the Convention in matters of environmental protection (an aspect regarded as forming part of the individual's private life) largely on the basis of principles enshrined in the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (ECE/CEP/43) (see *Taşkın and Others v. Turkey*, no. 49517/99, §§ 99 and 119, 4 December 2003). Turkey had not signed the Aarhus Convention.

84. The Court notes that the Government further invoked the absence of political support on the part of member States, in the context of the work of the Steering Committee for Human Rights, for the creation of an additional protocol to extend the Convention system to certain economic and social rights. The Court observes, however, that this attitude of member States was

accompanied, as acknowledged by the Government, by a wish to strengthen the mechanism of the Social Charter. The Court regards this as an argument in support of the existence of a consensus among Contracting States to promote economic and social rights. It is not precluded from taking this general wish of Contracting States into consideration when interpreting the provisions of the Convention.

4. Conclusion

85. The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.

86. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies (see, *mutatis mutandis*, *Marckx*, cited above, § 41).

B. The right for municipal civil servants to form trade unions

1. Chamber judgment

87. The Chamber considered that it had not been shown before it that the absolute prohibition on forming trade unions imposed on civil servants by Turkish law, as it was applied at the material time, met a "pressing social need". It found that the mere fact that the "legislation [had] not provide[d] for such a possibility" was not sufficient to warrant a measure as radical as the dissolution of a trade union.

88. Referring to the judgment in *Tüm Haber Sen and Çınar v. Turkey* (no. 28602/95, §§ 36-39, ECHR 2006-...), the Chamber considered that, absent any concrete evidence to show that the activities of the trade union Tüm Bel Sen represented a threat to society or to the State, the respondent State, in refusing to recognise the legal personality of the applicants' union, had failed to comply with its obligation to secure the enjoyment of the rights enshrined in Article 11 of the Convention. It held that there had been a violation of Article 11 of the Convention on this point.

2. The parties' submissions

(a) The Government

89. Before the Grand Chamber, the Government raised a plea of incompatibility *ratione materiae* with the provisions of the Convention: Article 11 of the Convention not being applicable to "members ... of the administration of the State", it could not be applied to the applicants in the present case as they belonged to that category of worker. The Court has decided to join this objection to the merits (see paragraph 56 above).

90. In support of their argument, the Government observed that all public officials in Turkey were covered by a specific set of rules. The situation of municipal civil servants was no different from that of other civil servants, as local-government bodies were clearly governmental organisations performing public duties.

91. The Government were of the opinion that it was impossible to render ineffective, by means of interpretation or use of case-law, the express terms of Article 11 *in fine*, which authorised States to impose, in respect of members of the armed forces, the police or the administration of the State, restrictions other than those that had to pass the test of necessity in a democratic society.

92. The Government further argued before the Grand Chamber that the cassation judgment of 6 December 1995 had had no repercussions on the intensive union activities of the trade union Tüm Bel Sen, because it had subsequently displayed an undeniable organisational efficiency and had been able to enter into hundreds of collective agreements, currently for the benefit of some ten thousand municipal employees.

(b) The applicants

93. As regards the fact that civil servants were prohibited from forming trade unions, the applicants agreed with the view of the Chamber, but pointed out that their main grievance related to the annulment of the collective agreement. They observed that the prohibition as applied in the present case did not take into account the fact that certain civil servants performed exactly the same work as employees in the private sector.

94. As to the effects that the cassation judgment of 6 December 1995 had had on the activities of the trade union Tüm Bel Sen, the applicants observed in the first place that the Ministry of the Interior had brought criminal and civil proceedings, for abuse of authority, against mayors who had entered into collective agreements with trade unions. Even though, more recently, such proceedings had been abandoned, the municipal authorities, fearing fresh proceedings, had ceased to engage in collective bargaining with trade unions. The activities of the trade union Tüm Bel Sen had thus been considerably limited.

95. The applicants also claimed, in this connection, that the Audit Court, following the cassation judgment of 6 December 1995, had invalidated the collective agreements signed by the trade union Tüm Bel Sen and that civil servants belonging to the union had had to reimburse all the additional wages or allowances they had received as a result of the defunct agreements. This development, which in itself constituted interference with the trade union's activities, had also prevented the union from persuading other municipal authorities to sign new collective agreements.

3. The Court's assessment

(a) Can the applicants, as municipal civil servants, be afforded the guarantees of Article 11 of the Convention?

96. The Court must now deal with the Government's objection that the application is incompatible *ratione materiae* with the provisions of the Convention on the ground that Article 11 of the Convention is not applicable to "members ... of the administration of the State".

It is true that paragraph 2 *in fine* of this provision clearly indicates that the State is bound to respect the freedom of association of its employees, subject to the possible imposition of lawful restrictions on the exercise by members of its armed forces, police or administration of the rights protected in that Article (see *Swedish Engine Drivers' Union v. Sweden*, § 37, Series A no. 20).

97. In this connection, the Court considers that the restrictions imposed on the three groups mentioned in Article 11 are to be construed strictly and should therefore be confined to the "exercise" of the rights in question. These restrictions must not impair the very essence of the right to organise. On this point the Court does not share the view of the Commission that the term "lawful" in the second sentence of Article 11 § 2 requires no more than that the restriction in question should have a basis in national law, and not be arbitrary and that it does not entail any requirement of proportionality (see *Council of Civil Service Unions and Others v. the United Kingdom*, no. 11603/85, Commission decision of 20 January 1987, Decisions and Reports 50, p. 241). Moreover, in the Court's view, it is incumbent on the State concerned to show the legitimacy of any restrictions to such persons' right to organise. The Court further considers that municipal civil servants, who are not engaged in the administration of the State as such, cannot in principle be treated as "members of the administration of the State" and, accordingly, be subjected on that basis to a limitation of their right to organise and to form trade unions (see, *mutatis mutandis*, *Tüm Haber Sen and Çınar*, cited above, §§ 35-40 and 50).

98. The Court observes that these considerations find support in the majority of the relevant international instruments and in the practice of European States.

99. Whilst paragraph 2 of Article 8 of the International Covenant on Economic, Social and Cultural Rights, which concerns the same subject matter, includes members of the administration of the State among the categories of persons who may be subject to restrictions, Article 22 of the International Covenant on Civil and Political Rights, the wording of which is similar to that of Article 11 of the Convention, provides that the State is entitled to restrict the exercise of the right to freedom of association only of members of the armed forces and of the police, without referring to members of the administration of the State.

100. The Court points out that the principal instrument guaranteeing, internationally, the right for public officials to form trade unions is ILO Convention No. 87 on Freedom of Association, Article 2 of which provides that all workers, without distinction whatsoever, have the right to establish and to join organisations of their own choosing (see paragraph 37 above).

101. The Court observes that the right of public officials to join trade unions has been confirmed on a number of occasions by the Committee of Experts on the Application of Conventions and Recommendations. This Committee, in its Individual Observation to the Turkish Government concerning Convention No. 87, considered that the only admissible exception to the right to organise as contemplated by that instrument concerned the armed forces and the police (see paragraph 38 above).

102. The Court further notes that the ILO Committee on Freedom of Association adopted the same line of reasoning as regards municipal civil servants. In the Committee's view, local public service employees should be able effectively to establish organisations of their own choosing, and these organisations should enjoy the full right to further and defend the interests of the workers whom they represent (see paragraph 39 above).

103. The instruments emanating from European organisations also show that the principle whereby civil servants enjoy the fundamental right of association has been very widely accepted by the member States. For example, Article 5 of the European Social Charter guarantees the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations. National legislation may impose partial restrictions on the police and total or partial restrictions on members of the armed forces, but no possibility of restriction is provided for in respect of other members of the administration of the State.

104. The right of association of civil servants has also been recognised by the Committee of Ministers of the Council of Europe in its Recommendation R (2000) 6 on the status of public officials in Europe, Principle no. 8 of which declares that public officials should, in principle, enjoy the same rights as all citizens, and that their trade-union rights should only be lawfully restricted in so far as that is necessary for the proper exercise of their public functions (see paragraph 46 above).

105. Another European instrument, the European Union's Charter of Fundamental Rights, has adopted an open approach to the right to organise, declaring, in its Article 12(1), among other things, that "everyone" has the right to form and to join trade unions for the protection of his or her interests (see paragraph 47 above).

106. As to European practice, the Court reiterates that the right of public servants to join trade unions is now recognised by all Contracting States (see paragraph 48 above). This right applies to public servants under a career or contractual system and to employees of publicly owned industrial or commercial enterprises, whether national or municipal. Civil servants, whether they work for central government or a local authority, are generally entitled to join the trade union of their choosing. The Court also takes note of the fact that the density of trade-union membership is generally higher in the public sector than in the private sector, which constitutes a manifest indication of a favourable legal and administrative environment created by member States. In the majority of member States, the few restrictions that can be found are limited to judicial offices, to the police and to the fire services, with the most stringent restrictions, culminating in the prohibition of union membership, being reserved for members of the armed forces.

107. The Court concludes from this that "members of the administration of the State" cannot be excluded from the scope of Article 11. At most the national authorities are entitled to impose "lawful restrictions" on those members, in accordance with Article 11 § 2. In the present case, however, the Government have failed to show how the nature of the duties performed by the applicants, as municipal civil servants, requires them to be regarded as "members of the administration of the State" subject to such restrictions. Accordingly, the applicants may legitimately rely on Article 11 of the Convention and any interference with the exercise of the right concerned must satisfy the requirements of paragraph 2 of that Article.

108. Accordingly, the applicants may legitimately rely on Article 11 of the Convention and the objection raised by the Government on this point must therefore be dismissed.

(b) General principles

109. The Court reiterates that Article 11 § 1 presents trade-union freedom as one form or a special aspect of freedom of association (see *National Union of Belgian Police v. Belgium*, 27 October 1975, § 38, Series A no. 19; and *Swedish Engine Drivers' Union*, cited above, § 39). The Convention makes no distinction between the functions of a Contracting State as holder of public power and its responsibilities as employer. Article 11 is no exception to that rule. On the contrary, paragraph 2 *in fine* of this provision clearly indicates that the State is bound to respect freedom of assembly and association, subject to the possible imposition of "lawful restrictions" in the case of members of its armed forces, police or

administration (see *Tüm Haber Sen and Çınar*, cited above, § 29). Article 11 is accordingly binding upon the "State as employer", whether the latter's relations with its employees are governed by public or private law (see *Swedish Engine Drivers' Union*, cited above, § 37).

110. The Court further reiterates that, although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations on the State to secure the effective enjoyment of such rights. In the specific context of the present case, the responsibility of Turkey would be engaged if the facts complained of by the applicants – that is to say, principally, the non-recognition of their union by the State at the material time – resulted from a failure on its part to secure to the applicants under domestic law the rights set forth in Article 11 of the Convention (see *Wilson, National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, § 41, ECHR 2002-V; and *Gustafsson v. Sweden*, 25 April 1996, § 45, *Reports* 1996-II).

111. However, as the Court has pointed out in the context of Article 8 of the Convention, whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the rights of an applicant under the Article or in terms of an interference by a public authority, to be justified in accordance with paragraph 2 of the Article, the applicable principles are broadly similar (see *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 98, ECHR 2003-VIII).

(c) Effects of State action or inaction on Tüm Bel Sen's activities

112. The Court must ascertain in the first place whether the Government's argument that the cassation judgment of 6 December 1995 had no effects on the union activities of Tüm Bel Sen is confirmed by the facts of the case.

113. It observes in this connection that the said judgment, to the extent that it was found therein that the applicant trade union had not acquired legal personality when it was created and, accordingly, that it was not entitled to take or defend legal proceedings, had two effects on the union's activities, one retrospective, the other prospective.

114. The judgment in question had the retrospective effect of rendering null and void *ab initio* all the activities and actions that Tüm Bel Sen had undertaken between 1991 and 1993 in relation to the Gaziantep Municipal Council for the purpose of protecting its members' interests, including the collective agreement involved in the present case. That effect was compounded by the decisions of the Audit Court requiring the reimbursement of the advantages obtained by members of the trade union as a result of negotiations with the employing authority.

115. As to the prospective effect of the cassation judgment in question, the Court regards as credible the applicants' argument that the trade union

Tüm Bel Sen had seen its activities considerably restricted as a result of the reluctance on the part of the heads of local authorities to enter into negotiations with it. It can be seen from the case file, firstly, that heads of municipal authorities who had agreed to grant advantages to civil servants under collective agreements had faced administrative, financial and judicial proceedings prior to the enactment of Law no. 4688 on 25 June 2001, and, secondly, that even after that date they were themselves obliged to reimburse to the State any additional sums that had been paid at the material time and then in turn bring proceedings against the civil servants who had received them.

116. As noted above (paragraph 88), the Chamber not only considered that there had been an unjustified interference with the rights of the applicants under Article 11 but that, in refusing to recognise the legal personality of the applicants' union, the State had failed to comply with its positive obligation to secure the enjoyment of the rights enshrined in that Article. Like the Chamber, the Grand Chamber considers that the present case can be analysed either as an interference with Article 11 or as a failure by the State to comply with its positive obligation to secure the applicants' rights under this provision. In the particular circumstances of the present case the Court considers that both approaches are possible given the mixture of action and inaction on the part of the authorities with which it is confronted. Accordingly it will proceed on the basis that this part of the case should be analysed from the standpoint of whether there was an interference with the applicants' rights but it will also have regard to the State's positive obligations in so doing.

(d) Compliance with Article 11

(i) Prescription by law and pursuit of a legitimate aim

117. Such interference will constitute a breach of Article 11 unless it was "prescribed by law", pursued one or more legitimate aims and was "necessary in a democratic society" for the achievement of those aims.

118. The Court notes that the impugned interference was in accordance with the domestic law as interpreted by the combined civil divisions of the Court of Cassation. Moreover, it is not in dispute that the judgment in question, in so far as it sought to prevent discrepancy between legislation and practice, was intended to prevent disorder (see *Tüm Haber Sen and Çınar*, cited above, §§ 33-34).

(ii) Necessity in a democratic society

119. As to the necessity of such interference in a democratic society, the Court reiterates that lawful restrictions may be imposed on the exercise of trade-union rights by members of the armed forces, of the police or of the administration of the State. However, it must also be borne in mind that the

exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining in such cases whether a "necessity" – and therefore a "pressing social need" – within the meaning of Article 11 § 2 exists, States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts (see, for example, *Sidiropoulos and Others v. Greece*, 10 July 1998, § 40, *Reports* 1998-IV). The Court must also look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in the appropriate provision of the Convention and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see, for example, *Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, § 51, ECHR 2002-II).

120. As to whether, in the present case, the non-recognition of the applicants' union was justified by a "pressing social need", the Grand Chamber endorses the following assessment of the Chamber:

> "it has not been shown before it that the absolute prohibition on forming trade unions imposed on civil servants ... by Turkish law, as it applied at the material time, met a 'pressing social need'. The mere fact that the 'legislation did not provide for such a possibility' is not sufficient to warrant as radical a measure as the dissolution of a trade union."

121. The Court further considers that at the material time there were a number of additional arguments in support of the idea that the non-recognition of the right of the applicants, as municipal civil servants, to form a trade union did not correspond to a "necessity".

122. Firstly, the right of civil servants to form and join trade unions was already recognised by instruments of international law, both universal (see paragraphs 98-102 above) and regional (see paragraphs 103-105 above). In addition, an examination of European practice shows that the freedom of association of public officials was generally recognised in all member States (see paragraph 106 above).

123. Secondly, Turkey had already, at the material time, ratified (by an instrument deposited on 12 July 1993) ILO Convention No. 87, the fundamental text securing, internationally, the right of public officials to form trade unions. This instrument was already, by virtue of the Turkish Constitution, directly applicable in domestic law (see paragraph 34 above).

124. Lastly, Turkey confirmed by its subsequent practice its willingness to recognise the right to organise of civil servants – a willingness already expressed by the ratification of ILO Convention No. 87 in 1993 – by the

amendment of the Constitution in 1995 and by the practice of the judicial organs from the early 1990s onwards. That latter practice is illustrated by the decisions taken in the present case by the District Court and the Fourth Civil Division of the Court of Cassation. Moreover, in 2000 Turkey signed the two United Nations instruments recognising the right in question (see paragraphs 40 and 41 above).

125. The Court observes that, in spite of these developments in international law, the Turkish authorities were unable to secure to the applicants the right to form a trade union, mainly for two reasons. Firstly, the Turkish legislature, after the ratification in 1993 of ILO Convention No. 87 by Turkey, did nothing more until 2001, the year in which it enacted the Civil Servants' Trade Union Act (Law no. 4688), which governs the practical application of this right. Secondly, during this transitional period, the combined civil divisions of the Court of Cassation refused to follow the solution proposed by the Gaziantep District Court, which had been guided by developments in international law, and gave a restrictive and formalistic interpretation of the domestic legislation concerning the forming of legal entities. This interpretation prevented the combined civil divisions from assessing the specific circumstances of the case and from ascertaining whether a fair balance had been struck between the respective interests of the applicants and of the employing authority, Gaziantep Municipal Council (see, *mutatis mutandis*, *Sørensen and Rasmussen*, cited above, § 58).

126. The Court thus considers that the combined effect of the restrictive interpretation by the Court of Cassation and the legislature's inactivity between 1993 and 2001 prevented the State from fulfilling its obligation to secure to the applicants the enjoyment of their trade-union rights and cannot be justified as "necessary in a democratic society" within the meaning of Article 11 § 2 of the Convention.

127. Accordingly, there has been a violation of Article 11 of the Convention on account of the failure to recognise the right of the applicants, as municipal civil servants, to form a trade union.

C. Annulment of a collective agreement between the trade union Tüm Bel Sen and the authority which had been applied for the previous two years

1. The Chamber judgment

128. The Chamber examined this point separately from the complaint concerning the refusal of the Court of Cassation to recognise the right of civil servants to form trade unions.

129. As to the question whether there had been a breach of the applicants' trade-union rights, the Chamber considered that the Court's case-law did not exclude the possibility that the right to enter into a collective

agreement might represent, in the particular circumstances of a case, one of the principal means – even the foremost of such means – for trade unionists to protect their interests. It noted the organic link between freedom of association and freedom to bargain collectively, as previously referred to by the Social Charter's Committee of Independent Experts.

130. The Chamber, after observing that, in the present case, the trade union Tüm Bel Sen had persuaded the authority to engage in collective bargaining and to enter into a collective agreement, and that this agreement had for a period of two years governed all working relations between municipal-council staff and their employer, considered that this collective agreement represented for the trade union the principal, if not only, means of promoting and safeguarding its members' interests (see §§ 30-40 of the Chamber judgment).

131. The Chamber also considered that the interference in question was prescribed by law and that the prevention of discrepancy between practice and the current domestic law could be regarded as a legitimate aim within the meaning of paragraph 2 of Article 11 (see § 42 of the Chamber judgment). As regards the justification for the interference, the Chamber found that no pressing need in this connection had been shown by the Government. It also found that Turkey had failed in its positive obligation under Article 11 to assist the applicants' union in defending its members' interests.

2. The parties' observations

132. The parties agreed that the Grand Chamber had to examine the complaint concerning the annulment of the collective agreement separately from the complaint concerning the applicants' right to form trade unions.

(a) The Government

133. The Government argued that the complaint relating to the annulment of the collective agreement had to be examined separately, in so far as, in their opinion, it raised separate legal questions from those raised by the applicants' right to form a trade union.

134. In the Government's opinion, it was not appropriate to modify the case-law established in the 1970s to the effect that the right to enter into collective agreements was not a right guaranteed as such by Article 11. Going beyond the early classical cases of *National Union of Belgian Police v. Belgium* or *Swedish Engine Drivers' Union v. Sweden*, this case-law had been reiterated more recently in inadmissibility decisions (see *Francesco Schettini and Others v. Italy* (dec), no. 29529/95, 9 November 2000; and *UNISON v. the United Kingdom* (dec.), no. 53574/99, ECHR 2002-I).

135. The Government pointed out in this connection that trade-union rights could be implemented in a number of different forms and they argued that the State was free to select those that were to be used by trade unions.

They claimed that it was not for the Court to impose any particular form on Contracting States for the purposes of Article 11.

136. They contended, moreover, that it was impossible to establish a common European practice as regards the right of civil servants to enter into collective agreements. In certain Contracting States, only contractual State employees (as opposed to career civil servants) enjoyed such a right, whilst in others only those civil servants who held senior posts were excluded.

137. Lastly, the Government considered that the ILO Conventions ratified by Turkey were not pertinent in the context of Article 11 of the Convention. They argued that the Court should not make use of them to create new rights that could be relied upon under the Convention.

(b) The applicants

138. The applicants explained that their principal complaint concerned the annulment of the collective agreement between them and the Gaziantep Municipal Council. They stated that they shared the Chamber's analysis of this question, whilst pointing out that the Court of Cassation's position totally disregarded their rights in this connection.

139. They further agreed with the concurring opinion of three judges in the Chamber who had stated that the right to bargain collectively should be regarded nowadays as one of the essential elements inherent in the right to form trade unions, within the meaning of Article 11 of the Convention.

3. Whether there was interference

(a) General principles concerning the substance of the right of association

(i) Evolution of case-law

140. The development of the Court's case-law concerning the constituent elements of the right of association can be summarised as follows: the Court has always considered that Article 11 of the Convention safeguards freedom to protect the occupational interests of trade-union members by the union's collective action, the conduct and development of which the Contracting States must both permit and make possible (see *National Union of Belgian Police*, cited above, § 39; *Swedish Engine Drivers' Union*, cited above, § 40; and *Schmidt and Dahlström v. Sweden*, 6 February 1976, § 36, Series A no. 21).

141. As to the substance of the right of association enshrined in Article 11 of the Convention, the Court has taken the view that paragraph 1 of that Article affords members of a trade union a right, in order to protect their interests, that the trade union should be heard, but has left each State a free choice of the means to be used towards this end. What the Convention requires, in the Court's view, is that under national law trade unions should

be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests (see *National Union of Belgian Police*, cited above, § 39; *Swedish Engine Drivers' Union*, cited above, § 40; and *Schmidt and Dahlström*, cited above, § 36).

142. As regards the right to enter into collective agreements, the Court initially considered that Article 11 did not secure any particular treatment of trade unions, such as a right for them to enter into collective agreements (see *Swedish Engine Drivers' Union*, cited above, § 39). It further stated that this right in no way constituted an element necessarily inherent in a right guaranteed by the Convention (see *Schmidt and Dahlström*, cited above, § 34).

143. Subsequently, in the case of *Wilson, National Union of Journalists and Others*, the Court considered that even if collective bargaining was not indispensable for the effective enjoyment of trade-union freedom, it might be one of the ways by which trade unions could be enabled to protect their members' interests. The union had to be free, in one way or another, to seek to persuade the employer to listen to what it had to say on behalf of its members (*Wilson, National Union of Journalists and Others*, cited above, § 44).

144. As a result of the foregoing, the evolution of case-law as to the substance of the right of association enshrined in Article 11 is marked by two guiding principles: firstly, the Court takes into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, subject to its margin of appreciation; secondly, the Court does not accept restrictions that affect the essential elements of trade-union freedom, without which that freedom would become devoid of substance. These two principles are not contradictory but are correlated. This correlation implies that the Contracting State in question, whilst in principle being free to decide what measures it wishes to take in order to ensure compliance with Article 11, is under an obligation to take account of the elements regarded as essential by the Court's case-law.

145. From the Court's case-law as it stands, the following essential elements of the right of association can be established: the right to form and join a trade union (see, as a recent authority, *Tüm Haber Sen and Çınar*, cited above), the prohibition of closed-shop agreements (see, for example, *Sørensen and Rasmussen*, cited above) and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members (*Wilson, National Union of Journalists and Others*, cited above, § 44).

146. This list is not finite. On the contrary, it is subject to evolution depending on particular developments in labour relations. In this connection it is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the

increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights (see, *mutatis mutandis*, *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 100, ECHR 2003-II; and *Selmouni v. France* [GC], no. 25803/94, § 101, ECHR 1999-V).

(ii) The right to bargain collectively

147. The Court observes that in international law, the right to bargain collectively is protected by ILO Convention No. 98 concerning the Right to Organise and to Bargain Collectively. Adopted in 1949, this text, which is one of the fundamental instruments concerning international labour standards, was ratified by Turkey in 1952. It states in Article 6 that it does not deal with the position of "public servants engaged in the administration of the State". However, the ILO's Committee of Experts interpreted this provision as excluding only those officials whose activities were specific to the administration of the State. With that exception, all other persons employed by government, by public enterprises or by autonomous public institutions should benefit, according to the Committee, from the guarantees provided for in Convention No. 98 in the same manner as other employees, and consequently should be able to engage in collective bargaining in respect of their conditions of employment, including wages (see paragraph 43 above).

148. The Court further notes that ILO Convention No. 151 (which was adopted in 1978, entered into force in 1981 and has been ratified by Turkey) on labour relations in the public service ("Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service") leaves States free to choose whether or not members of the armed forces or of the police should be accorded the right to take part in the determination of working conditions, but provides that this right applies everywhere else in the public service, if need be under specific conditions. In addition, the provisions of Convention No. 151, under its Article 1 § 1, cannot be used to reduce the extent of the guarantees provided for in Convention No. 98 (see paragraph 44 above).

149. As to European instruments, the Court finds that the European Social Charter, in its Article 6 § 2 (which Turkey has not ratified), affords to all workers, and to all unions, the right to bargain collectively, thus imposing on the public authorities the corresponding obligation to promote actively a culture of dialogue and negotiation in the economy, so as to ensure broad coverage for collective agreements. The Court observes, however, that this obligation does not oblige authorities to enter into collective agreements. According to the meaning attributed by the European

Committee of Social Rights (ECSR) to Article 6 § 2 of the Charter, which in fact fully applies to public officials, States which impose restrictions on collective bargaining in the public sector have an obligation, in order to comply with this provision, to arrange for the involvement of staff representatives in the drafting of the applicable employment regulations.

150. As to the European Union's Charter of Fundamental Rights, which is one of the most recent European instruments, it provides in Article 28 that workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels.

151. As to the practice of European States, the Court reiterates that, in the vast majority of them, the right of civil servants to bargain collectively with the authorities has been recognised, subject to various exceptions so as to exclude certain areas regarded as sensitive or certain categories of civil servants who hold exclusive powers of the State. In particular, the right of public servants employed by local authorities and not holding State powers to engage in collective bargaining in order to determine their wages and working conditions has been recognised in the majority of Contracting States. The remaining exceptions can be justified only by particular circumstances (see paragraph 52 above).

152. It is also appropriate to take into account the evolution in the Turkish situation since the application was lodged. Following its ratification of Convention No. 87 on freedom of association and the protection of the right to organise, Turkey amended, in 1995, Article 53 of its Constitution by inserting a paragraph providing for the right of unions formed by public officials to take or defend court proceedings and to engage in collective bargaining with authorities. Later on, Law no. 4688 of 25 June 2001 laid down the terms governing the exercise by civil servants of their right to bargain collectively.

153. In the light of these developments, the Court considers that its case-law to the effect that the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of Article 11 (*Swedish Engine Drivers' Union*, cited above, § 39, and *Schmidt and Dahlström*, cited above, § 34) should be reconsidered, so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see *Vilho Eskelinen and Others*, cited above, § 56).

154. Consequently, the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain

collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants, except in very specific cases, should enjoy such rights, but without prejudice to the effects of any "lawful restrictions" that may have to be imposed on "members of the administration of the State" within the meaning of Article 11 § 2 – a category to which the applicants in the present case do not, however, belong (see paragraph 108 above).

(b) Application in the present case of the foregoing principles

155. In the light of the foregoing principles, the Court considers that the trade union Tüm Bel Sen, already at the material time, enjoyed the right to engage in collective bargaining with the employing authority, which had moreover not disputed that fact. This right constituted one of the inherent elements in the right to engage in trade-union activities, as secured to that union by Article 11 of the Convention.

156. As to the impugned collective agreement entered into after collective bargaining, the Grand Chamber, like the Chamber, takes note of the following facts:

> "In the first place, the trade union Tüm Bel Sen persuaded the employer, Gaziantep Municipal Council, to engage in collective bargaining over questions that it regarded as important for the interests of its members and to reach an agreement in order to determine their reciprocal obligations and duties.
>
> Subsequently, following those negotiations, a collective agreement was entered into between the employer and the union Tüm Bel Sen. All the rights and obligations of its members were provided for and protected under that agreement.
>
> Moreover, the collective agreement was implemented. For a period of two years, with the exception of certain financial provisions that were in dispute between the parties, the collective agreement governed all employer-employee relations within Gaziantep Municipal Council."

157. Accordingly, the Court observes that the collective bargaining in the present case and the resulting collective agreement constituted, for the trade union concerned, an essential means to promote and secure the interests of its members. The absence of the legislation necessary to give effect to the provisions of the international labour conventions already ratified by Turkey, and the Court of Cassation judgment of 6 December 1995 based on that absence, with the resulting *de facto* annulment *ex tunc* of the collective agreement in question, constituted interference with the applicants' trade-union freedom as protected by Article 11 of the Convention.

158. As to the applicants' arguments concerning the insufficiency of the new legislation with regard to the trade-union rights of civil servants, the Court points out that the object of the present application does not extend to the fact that the new Turkish legislation fails to impose on the authorities an obligation to enter into collective agreements with civil servants' trade unions, or to the fact that those unions do not have the right to strike in the event that their collective bargaining should prove unsuccessful.

4. Whether the interference was justified

159. The Court considers that the interference in question, namely the annulment *ex tunc* of the collective agreement that the trade union Tüm Bel Sen had entered into following collective bargaining with the authority that employed the applicants, should be regarded as having breached Article 11, unless it can be shown that it was "prescribed by law", that it pursued one or more legitimate aims, in accordance with paragraph 2, and that it was "necessary in a democratic society" to fulfil such aims.

(a) Prescription by law

160. The Government and the applicants agreed with the Chamber's finding that the interference in question was prescribed by law. For the purposes of the present case, the Grand Chamber can accept that the interference was prescribed by law, as interpreted by the combined civil divisions of the Court of Cassation, the highest judicial body to have ruled on the case.

(b) Pursuit of a legitimate aim

161. The Court can also accept, like the Chamber and the parties themselves, that the interference in question, in so far as it aimed to prevent discrepancy between law and practice, pursued a legitimate aim: the prevention of disorder. As to the fact that the risk of such discrepancy was the result of the time taken by the legislature to adapt the legislation to Turkey's international commitments in the field of international labour standards, the Court considers that its assessment must likewise relate to the question whether such a measure was necessary in a democratic society.

(c) Necessity in a democratic society

162. The Court refers in this connection to the case-law set out above concerning the negative and positive obligations imposed on the Government by Article 11 of the Convention (see paragraphs 119 and 110 above).

163. As to the application of these principles in the present case, the Court notes that the Government have omitted to show how the impugned restriction was necessary in a democratic society, standing by their principal

argument to the effect that the applicants, in their capacity as civil servants, did not have the right to bargain collectively or enter into collective agreements.

164. The Court, performing its own examination, considers that at the material time a number of elements showed that the refusal to accept that the applicants, as municipal civil servants, enjoyed the right to bargain collectively and thus to persuade the authority to enter into a collective agreement, did not correspond to a "pressing social need".

165. Firstly, the right for civil servants to be able, in principle, to bargain collectively, was recognised by international law instruments, both universal (see paragraphs 147-148 above) and regional (see paragraphs 149-150 above). Moreover, an examination of European practice shows that this right was recognised in the majority of member States (see paragraphs 52 and 151 above).

166. Secondly, Turkey had in 1952 ratified ILO Convention No. 98, the principal instrument protecting, internationally, the right for workers to bargain collectively and enter into collective agreements (see paragraphs 42-43 and 151 above). There is no evidence in the case file to show that the applicants' union represented "public servants engaged in the administration of the State", that is to say, according to the interpretation of the ILO's Committee of Experts, officials whose activities are specific to the administration of the State and who qualify for the exception provided for in Article 6 of ILO Convention No. 98.

167. In these circumstances, the Grand Chamber shares the following consideration of the Chamber:

> "The Court cannot accept that the argument based on an omission in the law – caused by a delay on the part of the legislature – was sufficient in itself to make the annulment of a collective agreement which had been applied for the past two years satisfy the conditions for any restriction of the freedom of association."

168. Moreover, the Grand Chamber observes that the Government failed to adduce evidence of any specific circumstances that could have justified the exclusion of the applicants, as municipal civil servants, from the right, inherent in their trade-union freedom, to bargain collectively in order to enter into the agreement in question. The explanation that civil servants, without distinction, enjoy a privileged position in relation to other workers is not sufficient in this context.

169. The Court thus finds that the impugned interference, namely the annulment *ex tunc* of the collective agreement entered into by the applicants' union following collective bargaining with the authority was not "necessary in a democratic society", within the meaning of Article 11 § 2 of the Convention.

170. There has therefore been a violation of Article 11 of the Convention on this point also, in respect of both the applicants' trade union and the applicants themselves.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

171. The applicants argued that the restrictions imposed on their freedom to form trade unions and enter into collective agreements constituted a discriminatory distinction for the purposes of Article 14 of the Convention taken in conjunction with Article 11.

172. However, in view of its findings under Article 11, the Court, as did the Chamber, does not consider it necessary to examine this complaint separately.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

173. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

174. Before the Chamber, Mr Kemal Demir claimed that he had sustained pecuniary damage in the sum of 551 euros (EUR), on account of the additional pay that he would have received over a thirteen-year period if the collective agreement had not been annulled. He also claimed EUR 14,880 in respect of non-pecuniary damage resulting from his disappointment at being deprived of the means to assert his rights.

175. Mrs Vicdan Baykara, on behalf of the trade union that she represented and of its members, claimed compensation for non-pecuniary damage in the sum of EUR 148,810.

176. The Chamber awarded EUR 20,000 in respect of non-pecuniary damage to Mrs Vicdan Baykara, in her capacity as representative of the trade union Tüm Bel Sen, to be shared between the members of the union, together with EUR 500 to Mr Kemal Demir for all heads of damage combined.

177. The applicants requested the Grand Chamber to award them exactly the same amounts.

178. The Government disputed these claims. They submitted that there was no causal link between the pecuniary damage alleged by the two applicants and the cassation judgment in question, which concerned the legal capacity of the trade union Tüm Bel Sen. They moreover indicated that no documentary evidence had been adduced in support of the claims submitted on that basis. They lastly argued that Mrs Vicdan Baykara, in her capacity as President of the trade union Tüm Bel Sen, had simply been

discharging her duty as its representative and on that basis could not receive compensation for non-pecuniary damage.

179. As to the claim submitted by Mr Kemal Demir in respect of pecuniary damage, the Court considers that the sum which the applicant was obliged to pay back to the State following the annulment of the relevant collective agreement must be returned to him. Admittedly, the claim is not entirely supported by documentary evidence. However, the calculations produced in a simplified form by the applicants enable its accuracy to be verified. Making its assessment on an equitable basis, the Court awards Mr Kemal Demir EUR 500 for all heads of damage combined.

180. As to the claim submitted in respect of non-pecuniary damage by Mrs Vicdan Baykara on behalf of the trade union she represented, the Court draws attention to its case-law to the effect that the frustration felt by members of an organ that has been dissolved or prevented from acting can be taken into account in this connection (see, for example, *Dicle for the Democratic Party (DEP) of Turkey v. Turkey*, no. 25141/94, § 78, 10 December 2002; and *Presidential Party of Mordovia v. Russia*, no. 65659/01, § 37, 5 October 2004). The Court observes that at the material time the trade union Tüm Bel Sen was the principal union of municipal-council staff. Its dissolution and the annulment of its collective agreement with the Gaziantep Municipal Council must have caused deep feelings of frustration among its members, as they were thus deprived of their principal means of defending their occupational interests.

181. Making its assessment on an equitable basis, the Court awards the sum of EUR 20,000 in respect of non-pecuniary damage to the trade union Tüm Bel Sen. This sum is to be paid to Mrs Vicdan Baykara, who will be responsible for making it sum available to the trade union, which she represents.

B. Costs and expenses

182. Before the Grand Chamber, as before the Chamber, the applicants did not submit any claim for costs and expenses. The Court thus considers that there is no cause to make any award under this head.

C. Default interest

183. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins to the merits* the Government's preliminary objections and *dismisses* them;

2. *Holds* that there has been a violation of Article 11 of the Convention on account of the interference with the right of the applicants, as municipal civil servants, to form a trade union;

3. *Holds* that there has been a violation of Article 11 of the Convention on account of the annulment *ex tunc* of the collective agreement entered into by the trade union Tüm Bel Sen following collective bargaining with the employing authority;

4. *Holds* that it is not necessary to examine separately the complaints submitted under Article 14 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay, within three months, the following amounts, to be converted into new Turkish liras at the rate applicable at the date of settlement:
      (i) to Mrs Vicdan Baykara, representative of the trade union Tüm Bel Sen, EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage, to be distributed by her to the said trade union;
      (ii) to Mr Kemal Demir, EUR 500 (five hundred euros) in respect of all heads of damage combined;
      (iii) any tax that may be chargeable on the above amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 November 2008.

Michael O'Boyle	Christos Rozakis
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:

(a) Separate opinion of Judge Zagrebelsky;

(b) Concurring opinion of Judge Spielmann joined by Judges Bratza, Casadevall and Villiger.

C.L.R.
M.O.B.

SEPARATE OPINION OF JUDGE ZAGREBELSKY

(Translation)

I would like to add to the reasoning in the judgment as regards the right of trade unions to bargain collectively by expounding a few considerations of my own on the subject of the Court's departures from precedent.

1. On 6 February 1976 in the case of *Swedish Engine Drivers' Union v. Sweden* (Series A no. 20) the Court found in its judgment as follows (§ 39):

> " ... Article [11 para. 1] does not secure any particular treatment of trade unions, or their members, by the State, such as the right that the State should conclude any given collective agreement with them. Not only is this latter right not mentioned in Article 11 para. 1, but neither can it be said that all the Contracting States incorporate it in their national law or practice, or that it is indispensable for the effective enjoyment of trade union freedom."

The Court went on to conclude (§ 40):

> "... the members of a trade union have a right, in order to protect their interests, that the trade union should be heard. Article 11 para. 1 certainly leaves each State a free choice of the means to be used towards this end. While the concluding of collective agreements is one of these means, there are others. What the Convention requires is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests."

(see also, a judgment of the same date, *Schmidt and Dahlström v. Sweden*, §§ 34-35, Series A no. 21; and *National Union of Belgian Police v. Belgium*, 27 October 1975, § 39, Series A no. 19).

This case-law was referred to more recently, without being called into question, in 1996 and 2002, in the *Gustafsson v. Sweden* judgment (25 April 1996, § 45, *Reports of Judgments and Decisions* 1996-II) and in the *Wilson, National Union of Journalists and Others v. the United Kingdom* judgment of 2 July 2002 (nos. 30668/96, 30671/96 and 30678/96, § 44, ECHR 2002-V).

In the present judgment, by contrast, the Court has found that "the right to bargain collectively with the employer has, in principle, become one of the essential elements of the 'right to form and to join trade unions for the protection of [one's] interests' set forth in Article 11 of the Convention" (paragraph 154 of the judgment).

2. The Court has thus expressly departed from its case-law, taking into account "the perceptible evolution in such matters, in both international law and domestic legal systems" (paragraph 153 of the judgment). In reality, the new and recent fact that may be regarded as indicating an evolution internationally appears to be only the proclamation (in 2000) of the

European Union's Charter of Fundamental Rights. The evolution of legislation in the various States (paragraphs 52 and 151 of the judgment) is a more difficult basis on which to assess the time or period from which a significant change became perceptible.

I have the feeling that the Court's departure from precedent represents a correction of its previous case-law rather than an adaptation of case-law to a real change, at European or domestic level, in the legislative framework (as was the case, for example, in its *Stafford v. the United Kingdom* judgment of 28 May 2002 ([GC], no. 46295/99, ECHR 2002-IV)) or in the relevant social and cultural ethos (as, for example, in the *Christine Goodwin v. the United Kingdom* judgment of 11 July 2002 ([GC], no. 28957/95, ECHR 2002-VI)). This departure is probably closer to the situation dealt with by the Court in the case of *Pessino v. France* (no. 40403/02, 10 October 2006) than to the domestic case-law in the *S.W. v. the United Kingdom* judgment of 22 November 1995 (Series A no. 335-B). In any event, the evolution of public opinion which rendered foreseeable the solution adopted by the domestic courts in the *S.W.* case was already evident by the time of the offence of which the applicant stood accused.

3. The Court, recognising that "it is in the interests of legal certainty, foreseeability and equality before the law that [it] should not depart, without good reason, from [its] precedents", and being responsible for interpretation of the Convention (Article 32 of the Convention), has nevertheless proceeded with this departure, considering that "a failure by [it] to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement" (paragraph 153 of the judgment).

This is all perfectly consistent with the practice of the Court, which, whilst in principle following its own previous rulings, does from time to time, very cautiously, develop its case-law by a reversal of precedent (see *Christine Goodwin*, cited above, §§ 74 and 93; *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 56, ECHR 2007-....; and *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, §§ 109, 121 and 125, ECHR 2005-I).

4. All courts have to interpret the law in order to clarify it and, if need be, to keep pace with the changes in the society which they are serving (see, among many other authorities, *Kokkinakis v. Greece*, 25 May 1993, § 40, Series A no. 260-A; and *Cantoni v. France*, 15 November 1996, § 31, *Reports* 1996-V). For the purposes of the Convention the term "law" covers both enactments and the interpretation thereof by the courts (*Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A), such that divergences in case-law create uncertainty and a lack of foreseeability that are capable of raising doubt as to the legality of an interference with a Convention right (see *Driha v. Romania*, no. 29556/02, § 32, 21 February 2008; and

Păduraru v. Romania, no. 63252/00, § 98, ECHR 2005-XII). Any judicial interpretation of the law is by nature retrospective, in the sense that it applies to a prior situation or conduct.

However, in my opinion, the act of departing from precedent raises a particular problem, because the interaction between the new interpretation and the law, as previously contemplated, will give rise to a new "law" whose content is different to that of the previous "law". The retrospectiveness of the new "law" is problematic with regard to the requirements of foreseeability and legal certainty. I would compare this to the problems raised by the retrospective effect of an Act interpreting a previous Act, justifying a certain resistance on the part of the Court. The requirements in terms of the quality of the law, and particularly that of the foreseeability of its application, entail a need for a similar approach to the nature of judicial interpretation to that obtaining in the situation of laws succeeding each other in time, for which transitional provisions are often made.

5. As regards the case-law of domestic courts, the Court has already shown that it is aware of the problem in cases where it has taken note of rulings affording new domestic remedies to applicants (see *Di Sante v. Italy* (dec.), no. 56079/00, 24 June 2004; and *Cocchiarella v. Italy* [GC], no. 64886/01, § 44, ECHR 2006-...; see also *Giummarra and Others v. France* (dec.), no. 61166/00, 12 June 2001; *Mifsud v. France* (dec.) [GC], no. 57220/00, ECHR 2002-VIII; *Broca and Texier-Micault v. France*, nos. 27928/02 and 31694/02, § 20, 21 October 2003; and *Paulino Tomas v. Portugal* (dec.), no. 58698/00, ECHR 2003-VIII), whilst dealing with such situations as if they entailed the creation of a new law due to take effect ("enter into force") after a certain period of time, in the manner of a *vacatio legis*.

The same awareness is reflected in certain judgments of the European Court of Justice and of certain domestic courts, which, adopting the principle of prospective overrulings, or addressing the consequences of a mistake of law caused by existing case-law, do not apply (retrospectively and automatically) the new case-law to the case pending before it or to similar situations (see *Les revirements de jurisprudence* – Report presented to President Guy Canivet by the Working Party chaired by Nicolas Molfessis – Paris, Litec, 2004). In this connection, a particularly clear and pointed argument, in respect of Article 6 of the Convention, was used by the French Court of Cassation in a plenary judgment of 21 December 2006 (*Dalloz*, 2007, pp. 835 et seq., with a note by P. Morvan, *Le sacre du revirement prospectif sur l'autel de l'équitable*). The opinion of Lord Nicholls of Birkenhead in the *National Westminster Bank plc v. Spectrum Plus Limited and others and others* judgment of the House of Lords of 30 June 2005 ([2005] UKHL 41) is also worthy of note.

6. In its *Marckx v. Belgium* judgment of 13 June 1979 (§ 58, Series A no. 31), the Court, responding to the Government's request for determination of the effects of its ruling on previous situations, and taking into account the slow evolution towards the equality of treatment at issue in that case, dispensed the Belgian State from re-opening legal acts or situations that antedated the delivery of its judgment.

The Court, out of a concern for legal certainty, thus showed that it was aware of the need to refrain from calling into question situations concerning individuals whose proceedings relating to distributions of estates had already been concluded. However, that was an exceptional case, which could probably also be explained by the significance of the consequences that could otherwise have affected a large number of individuals.

The Court nevertheless applied its new case-law, finding that Belgium had breached the Convention in respect of the applicants. In the same vein, the Court held in its *Aoulmi v. France* judgment of 17 January 2006 (no. 50278/99, ECHR 2006-...) that there had been a violation of Article 34 of the Convention, dismissing the respondent Government's argument to the effect that the applicant's expulsion had taken place prior to the adoption by the Court, in its *Mamatkulov and Askarov* judgment of 4 February 2005 (cited above), of its new case-law as to the binding nature of measures indicated under Rule 39 of the Rules of Court. The Court thus considered that Contracting States had already been required to fulfil their obligations arising from Article 34 of the Convention at the time of the expulsion in question (see *Aoulmi*, cited above, § 111). Rightly so, but in the meantime the "content" of the obligation had changed as a result of the Court's new interpretation of Rule 39.

7. When it departs from precedent, the Court certainly changes the content of the Convention in relation to its own previous interpretation, given with the authority conferred on it by Article 32 of the Convention. If the new case-law extends the scope of a Convention provision and thus imposes a new obligation on States, a retrospective effect that is automatic and not subject to directions by the Court would, in my view, be difficult to reconcile with the requirements of foreseeability and legal certainty, which are essential pillars of the Convention system. Moreover, the application in each State, by domestic courts, of the Convention as interpreted by the Court, will then become difficult, if not impossible. I therefore find it necessary that provision be made for the period that precedes the departure from precedent.

8. In the light of the foregoing, I would have preferred it if the Court had stipulated the time from which the right in question "became" (paragraph 154 of the judgment) one of the essential elements of the right set forth in Article 11. In my own opinion, it would seem legitimate to doubt that this

could already have come about by 1995, when the Turkish Court of Cassation disposed of the case at domestic level. I moreover find it regrettable that the Court has once again allowed the "natural" retrospectiveness of judicial interpretation to impugn an approach that, at the material time, was (probably) not in breach of the Convention.

I did, however, vote in favour of finding a violation on account of the annulment of the collective agreement at issue (operative paragraph 3), as I share the Court's interpretation of Article 11. I must also take account of the Court's practice concerning the retrospective effect of its departures from precedent, although I personally believe that this practice should itself be the subject of such a departure.

CONCURRING OPINION OF JUDGE SPIELMANN JOINED BY JUDGES BRATZA, CASADEVALL AND VILLIGER

(Translation)

1. I voted without hesitation for finding a violation of Article 11 of the Convention on account of the failure to recognise the right of the applicants, as municipal civil servants, to form a trade union.

2. In the following lines I wish to explain why I also voted with the majority in favour of finding a violation of Article 11 of the Convention on account of the annulment *ex tunc* of the collective agreement entered into by the trade union Tüm Bel Sen following collective bargaining with the authority.

3. Paragraph 154 of the judgment reads as follows:

> "... the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the 'right to form and to join trade unions for the protection of [one's] interests' set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants, except in very specific cases, should enjoy such rights, but without prejudice to the effects of any 'lawful restrictions' that may have to be imposed on 'members of the administration of the State' within the meaning of Article 11 § 2 – a category to which the applicants in the present case do not, however, belong."

4. The emphasis is thus placed on the "right to bargain collectively with the employer".

5. It would be erroneous to infer that, for those working in the public service, "bargaining" has only one possible outcome: the "collective agreement". It should not be forgotten that, in many legal systems, the statutory situation of civil servants is an objective situation, governed by laws and/or regulations, from which no derogation can be made by means of individual agreements. The introduction of an unlimited contractual dimension through Article 11 of the Convention would have a drastic impact on civil-service law in many States. The status of civil servant is based on the unification, organisation and efficiency of the public service.

6. The following comments have been made by Nicolas Valticos with regard to ILO Convention No. 151 and the Labour Relations (Public Service) Recommendation, 1978 (R159):

> "335. A difficult issue in the area of trade-union rights, as more generally in the determination of employment conditions, is that of public officials, since they are employed to serve the State and the general interests of the nation, the State is not an employer like any other and, as depositary of the common interest, the State is not inclined, as an employer, to renounce its public-authority attributes, at least not systematically. This concept of relations between the State and its officials will vary, however, depending on the country. In some countries nowadays civil servants and other public officials – or most of them – tend to be treated as workers in the private sector, as regards, for example, collective bargaining and even the right to strike. In other countries, however, the traditional notions are still recognised. Another problem stems from the fact that the definition of civil servant varies in scope depending on the country, according to the extent of the public sector and to whether or not a distinction is made – and also to what degree – between civil servants as such (even distinguishing between sub-categories thereof) and public-sector employees in a broader sense ...
>
> ...
>
> 337. The recommendation (no. 159) which supplements the Convention ... leaves to national legislation, or to other appropriate means, the task of determining the various provisions (participation of public officials, procedure to be followed) for negotiation or other methods of determining terms and conditions of employment ..." (Nicolas Valticos, *Droit international du travail*, Coll. Droit du travail (dir. G.H. Camerlynck), Tome 8, 2nd edition, Dalloz, 1983, pp. 264-266).

7. That being said, it is no longer in dispute – as is made clear by the judgment – that freedom of association exists in the public service. Similarly, trade union associations have become permanent partners in discussions on working conditions between State employees and public authorities. Such associations cannot be ignored by the State as employer, or more generally by public authorities.

8. Even though the right to bargain collectively can no longer be called into question as such (see paragraphs 42-44 and 49-52 of the judgment), certain exceptions or limits must nevertheless always be possible in the public service, provided that the role of staff representatives in the drafting of the applicable employment conditions or regulations remains guaranteed. For example, as indicated by the Court in paragraph 149 of the judgment:

> "According to the meaning attributed by the European Committee of Social Rights (ECSR) to Article 6 § 2 of the Charter, which in fact fully applies to public officials, States which impose restrictions on collective bargaining in the public sector have an obligation, in order to comply with this provision, to arrange for the involvement of staff representatives in the drafting of the applicable employment regulations."

Similarly, the following provision is made by Article 7 of ILO Convention No. 151, quoted at paragraph 44 of the judgment:

> "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities

> concerned and public employees' organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters."

This provision thus authorises a certain flexibility in the choice of procedures for determining conditions of employment with the participation of civil servants (see also J. Llobera, "La fonction publique et la liberté syndicale dans les normes internationales du travail", *Revue trimestrielle des droits de l'homme*, 1992, p. 336, for whom such flexibility would not even entail recourse to collective bargaining).

9. In short, the basic issue is to ascertain what is meant by collective bargaining. The authorising of public officials to make their voices heard certainly implies that they have a right to engage in social dialogue with their employer, but not necessarily the right to enter into collective agreements or that States have a corresponding obligation to enable the existence of such agreements. States must therefore be able to retain a certain freedom of choice in such matters.

10. In the present case, however, the right to bargain collectively at issue had been rendered totally meaningless by the obstacles placed in the way of the social dialogue. The annulment *ex tunc* of the collective agreement entered into following collective bargaining with the authority had therefore entailed a violation of Article 11 of the Convention.