FIFTH SECTION

CASE OF ZLÍNSAT, SPOL. S R.O. v. BULGARIA

(Application no. 57785/00)

JUDGMENT

STRASBOURG

15 June 2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Zlínsat, spol. s r.o. v. Bulgaria,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mrs R. JAEGER, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 22 May 2006,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 57785/00) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Zlínsat, spol. s r.o., a limited liability company incorporated under Czech law whose registered office is in Fryšták, Dolní Ves, the Czech Republic ("the applicant company"), on 14 December 1999.

2. The applicant company was represented by Ms D. Gorbunova, a lawyer practising in Sofia, Bulgaria. The Bulgarian Government ("the respondent Government") were represented by their Agent, Ms M. Kotzeva, of the Ministry of Justice.

3. On 1 December 2004 the Court decided to give notice of the application to the respondent Government. It also transmitted a copy of it to the Czech Government, in view of the fact that the applicant company was incorporated in the Czech Republic (Article 36 § 1 of the Convention and Rule 44 § 1 (a) of the Rules of Court). Under the provisions of Article 29 § 3 of the Convention, the Court decided to examine the merits of the application at the same time as its admissibility.

4. The parties submitted observations in writing. In addition, third-party comments were received from the Czech Government ("the third-party Government"), who exercised their right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1 (b) of the Rules of Court). The respondent Government, but not the applicant company, replied to these comments (Rule 44 § 5).

5. On 1 April 2006 this case was assigned to the newly constituted Fifth Section (Rule 25 § 5 and Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. In September 1995 the Sofia Municipal Council decided to privatise a hotel owned by the Sofia Municipality, and situated in Gorna Banya, Sofia. In July 1996 the Sofia Municipal Privatisation Agency opened a procedure for the privatisation of the hotel through negotiations with potential buyers. At the close of the procedure only one company had submitted a privatisation bid. On 8 May 1997 that company assigned its rights under the privatisation procedure to the applicant company.

7. On 10 May 1997 the applicant company entered into a privatisation contract with the Sofia Municipal Council, whereby it bought the hotel. It agreed to pay 425,000 United States dollars (USD) and also agreed to make, during the following five years, investments in the amount of USD 1,500,000. The applicant company also undertook to create forty-five new jobs. Clause 8(7) of the contract stipulated that the applicant company was barred from disposing of the hotel for five years without the express consent of the Sofia Municipal Council. Clause 10 of the contract, however, stipulated that the applicant company could convey the hotel as non-cash consideration for shares in a limited liability company, if it held at least 67% of such a company's shares.

8. In a decision of 7 July 1997 the Sofia City Prosecutor's Office, acting pursuant to an article in the weekly newspaper *Capital* published in its issue of 25 May 1997, and to complaints by employees and leaseholders of hotel premises, ordered the suspension of the performance of the privatisation contract. It relied on Article 185 § 1 of the Code of Criminal Procedure of 1974 ("the CCrP") and on section 119(1)(6) of the Judicial Power Act of 1994 (see paragraphs 37 and 38 below), and reasoned that the privatisation procedure had been tainted by a breach of paragraph 8 of the transitional and concluding provisions of the Transformation and Privatisation of State and Municipally-Owned Enterprises Act of 1992 (see paragraph 44 below). There were also indications that certain interested parties had not been properly notified of the privatisation terms. The latest valuation of the hotel prior to the privatisation had been conducted under circumstances which called into question the objectivity of the officials involved. These facts could only be elucidated through a criminal investigation. The prosecution authorities were also bound to exercise their powers under Article 27 § 1 of the Code of Civil Procedure of 1952 ("the CCP") (see paragraph 40 below). In these circumstances, the performance of the obligations in the privatisation contract would disturb public order, lead to the commission of offences by officials and economic offences, and cause considerable damage.

9. The decision was served on the chairperson of the Sofia Municipal Council and on the Sofia Municipal Privatisation Agency, but not on the applicant company.

10. The mayor of Sofia appealed against the decision to the Chief Prosecutor's Office, arguing that the privatisation contract could only be set aside by a court. In a decision of 25 July 1997 the Chief Prosecutor's Office dismissed the appeal, reasoning that the lower prosecutor's office had correctly found that measures – consisting of the suspension of the performance of the contract – had to be taken to prevent the future commission of offences and that it was bound to seek the annulment of the contract by a court.

11. The mayor of Sofia further appealed to the Chief Prosecutor. In a decision of 28 August 1997 the Chief Prosecutor rejected the appeal, fully endorsing the reasoning of the lower prosecutor's offices and noting that a criminal investigation had been opened into the matter.

12. The applicant company was not served copies of the above decisions and was apparently not aware of these developments.

13. In the meantime, on 12 August 1997, the Sofia Municipality handed possession of the hotel over to the applicant company. On 18 August 1997 the mayor of Sofia ordered that all prior leaseholders be removed from the hotel premises.

14. On an unspecified date the Sofia City Prosecutor's Office apparently opened a criminal investigation against an official of the Sofia Municipality or the municipal company which previously owned the hotel. The charges apparently included abuse of office.

15. In a decision of 2 October 1997 the Sofia City Prosecutor's Office, relying on Article 185 § 1 of the CCrP and on section 119(1)(6) of the Judicial Power Act of 1994, ordered the police to remove the applicant company's officers, subcontractors and agents from the hotel, which was to be placed in the custody of a State-owned company. It also ordered the police to seize all accounting and other documents relating to the returns obtained by the company since it had taken possession of the hotel, and to notify its officers that any attempt to regain possession of the hotel would constitute an offence under Article 323 § 2 of the Criminal Code of 1968 (see paragraph 45 below). It reasoned that by undertaking these measures despite the fact that it had ordered the suspension of the performance of the privatisation contract and had commenced an action under paragraph 8 of the transitional and concluding provisions of Transformation and Privatisation of State and Municipally-Owned Enterprises Act of 1992 and a criminal investigation, the Sofia Municipality had seriously breached section 119(2) of the Judicial Power Act of 1994 (see paragraphs 35 and 44 below) and had infringed important public interests and public order.

16. This decision was served on the Sofia Municipality, but not on the applicant company. The company learned about it on 6 October 1997, when

the police arrived at the hotel, removed its officers and agents from the premises, and warned its manager that any attempt to regain possession of the hotel would constitute an offence under Article 323 § 2 of the Criminal Code of 1968 (see paragraph 45 below).

17. The Sofia Municipality appealed against the decision to the Chief Prosecutor's Office, arguing that it had been unlawful, as the applicant company was the rightful owner of the hotel and there were no legal grounds for its eviction. In a decision of 27 November 1997 the Chief Prosecutor's Office dismissed the appeal. It found that the performance of the privatisation contract had been suspended and that an action had been commenced by the Sofia City Prosecutor's Office aiming to annul the contract. The legal basis of the decision appealed against were Article 185 § 1 of the CCrP and section 119(1)(6) of the Judicial Power Act of 1994. The fact that a civil action had been commenced and that a criminal investigation had been opened indicated that there was a risk that an offence would be committed. The legality of the decision was not affected by the fact that it had not been served on the applicant company.

18. Meanwhile, on 17 September 1997, the Sofia City Prosecutor's Office, exercising its powers under Article 27 § 1 of the CCP (see paragraph 40 below), brought a civil action against the Sofia Municipality and the applicant company, seeking the annulment of the privatisation contract. It argued that it had been entered into under manifestly disadvantageous conditions, within the meaning of paragraph 8 of the transitional and concluding provisions of Transformation and Privatisation of State and Municipally-Owned Enterprises Act of 1992. The price paid for the hotel had been below its real market value. The penalties stipulated in the contract in the event of a failure of the applicant company to perform its investment obligations were negligible. The applicant company was allowed to convey the hotel as non-cash consideration for shares in a limited liability company despite the prohibition to dispose of the hotel for five years. The contract made no provision for its rescission in the event of non-performance. Finally, the performance of the contract was questionable in view of the fact that the negotiations had initially been conducted with another company, while the applicant company had intervened in the process later.

19. On 9 December 1997 the Sofia Municipality made a request for a declaratory judgment to the effect that the decisions of the Sofia City Prosecutor's Office had been made without a legal basis, were *ultra vires* and thus null and void, and did not entail any legal consequences. In a final decision of 11 February 1998 the Sofia City Court rejected the request as inadmissible, holding that it was not connected with the subject-matter of the original action, as it concerned acts which post-dated the execution of the contract, and that it was not sufficiently precise, as it did not specifically identify all impugned decisions of the Sofia City Prosecutor's Office. The

court went on to say that it had no jurisdiction to rule on the lawfulness of prosecutors' decisions and actions in civil proceedings.

20. In a judgment of 3 April 1998 the Sofia City Court dismissed the Sofia City Prosecutor's Office's action. It held, *inter alia*, that the price at which the hotel had been sold was not unreasonable. It took into account not only the cash amount paid to the Sofia Municipal Council, but also the investment and job creation commitments. The court went on to say that there was no legal prohibition on the use of privatised property as non-cash consideration for shares. There was nothing to prevent the parties to the contract to agree that the applicant company was free to do so under certain conditions. The Sofia City Prosecutor's Office's arguments concerning the possibility of such a transaction were immaterial, as the court's task was not to hypothesise about future events, but to decide on the basis of concrete facts. The court further found that the lack of any clauses in the contract for its rescission did not render it manifestly disadvantageous, since in the event of non-performance it could be rescinded by virtue of the law. The penalties provided by the contract for non-performance were immaterial since the Sofia Municipal Council could in any event claim compensation for its actual damages by law. The court thus did not find it established that the contract had been entered into under manifestly disadvantageous conditions.

21. The Sofia City Prosecutor's Office appealed to the Sofia Court of Appeals. Its appeal was not endorsed by the Sofia Appellate Prosecutor's Office, which argued in an additional memorial that the Sofia City Court had correctly disposed of the case.

22. In a judgment of 4 March 1999 the Sofia Court of Appeals upheld the Sofia City Court's judgment, with similar reasoning.

23. Despite its previous stance, the Sofia Appellate Prosecutor's Office lodged an appeal on points of law with the Supreme Court of Cassation, apparently on the express instructions of the Supreme Cassation Prosecutor's Office (the successor entity of the Chief Prosecutor's Office).

24. A hearing was held on 28 June 1999, at which a prosecutor of the Supreme Cassation Prosecutor's Office maintained the appeal.

25. In a final judgment of 30 July 1999 the Supreme Court of Cassation upheld the lower court's judgment, fully confirming its reasoning.

26. In the meantime, while the proceedings before the Supreme Court of Cassation were pending, on 17 May 1999 the applicant company appealed to the Sofia Appellate Prosecutor's Office against the Sofia City Prosecutor's Office decisions of 7 July and 2 October 1997. It argued that they were unlawful and that the Sofia City Prosecutor's Office reliance on Article 185 § 1 of the CCrP had been misplaced. It filed the appeal through the Sofia City Prosecutor's Office.

27. In a letter of 22 June 1999 the Sofia City Prosecutor's Office informed the applicant company that the decisions had already been unsuccessfully appealed before the Chief Prosecutor's Office and the Chief

Prosecutor and sent the applicant company copies of the latter's decisions. It noted that there were no new facts warranting the rescission or variation of the impugned decisions.

28. On 6 July 1999 the applicant company filed its appeal directly with the Sofia Appellate Prosecutor's Office.

29. In a decision of 9 July 1999 the Sofia Appellate Prosecutor's Office rejected the appeal. It reasoned that the decisions of 7 July and 2 October 1997 had already been appealed against before the Chief Prosecutor's Office and the Chief Prosecutor, which had rejected the appeals. It had therefore no competence to examine them.

30. On 24 August 1999 the applicant company applied to the Sofia City Prosecutor's Office, asking it to rescind its decisions of 7 July and 2 October 1997. It argued that the dismissal of the action against it by means of a final judgment was a fresh fact indicating that the privatisation contract had not been entered into under manifestly disadvantageous conditions and that no State or public interests had been prejudiced thereby. Moreover, the prohibition to use the hotel had already lasted two years, without any justification, in breach of its right under Article 1 of Protocol No. 1 to peacefully enjoy its possessions.

31. In a letter of 14 September 1999 the Sofia City Prosecutor's Office informed the applicant company that there was no need to rescind the decision of 2 October 1997, but that the final judgment of the Supreme Court of Cassation was binding upon the parties to the case and they should comply with it.

32. In a letter of 5 October 1999, a copy of which was sent to the applicant company, the Sofia City Prosecutor's Office notified the police that following the Supreme Court of Cassation's judgment the decisions of 7 July and 2 October 1997 were no longer enforceable.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Prosecutor's Office

1. Overview

33. The Prosecutor's Office („прокуратурата") is part of the judicial branch (Article 117 § 2 of the Constitution of 1991). Its structure mirrors that of the courts (Article 126 § 1 of the Constitution of 1991). Prosecutors are appointed, promoted, demoted and dismissed the way judges are, and enjoy the same tenure and immunities (Articles 129, 131, and 132 § 1 of the Constitution of 1991). The task of the Prosecutor's Office is to ensure the enforcement of the law by (i) prosecuting persons who have allegedly

committed criminal offences, (ii) overseeing the execution of penalties and coercive measures, (iii) seeking the annulment of unlawful decisions and instruments, and (iv) participating, where provided by law, in civil and administrative proceedings (Article 127 of the Constitution of 1991).

34. Section 112 of the Judicial Power Act of 1994 („Закон за съдебната власт“) provides that the Prosecutor's Office is unified and centralised, that each prosecutor is subordinate to the respective senior prosecutor, and that all prosecutors are subordinate to the Chief Prosecutor (the latter is also provided by Article 126 § 2 of the Constitution of 1991). The Chief Prosecutor may issue directives and give instructions relating to the Prosecutor's Office's activity (sections 111(3) and 114 of the Judicial Power Act of 1994). The Chief Prosecutor oversees the work of all prosecutors, and the prosecutors of the appellate and the regional prosecutor's offices oversee the work of their subordinate prosecutors (section 115(1) and (2) of the Judicial Power Act of 1994). Higher prosecutors may perform all acts which are in the competence of their subordinate prosecutors. They may also stay or revoke their decisions in the cases provided for by law (section 116(2) of the Judicial Power Act of 1994). The higher prosecutors' written orders are binding on their subordinate prosecutors (section 116(3) of the Judicial Power Act of 1994).

35. Prosecutors' decisions issued within their competence and in accordance with the law are binding on all state officials and private persons (section 119(2) of the Judicial Power Act of 1994). Prosecutors may give orders to the police (section 119(4) of the Judicial Power Act of 1994).

36. Prosecutors are immune from civil liability for the damage they have inflicted while discharging their duties, unless in so doing they have committed a publicly prosecutable criminal offence (Article 132 § 1 of the Constitution of 1991 and section 134(1) of the Judicial Power Act of 1994).

2. Powers of the Prosecutor's Office to take measures to prevent the commission of criminal offences

37. Article 185 § 1 of the CCrP (repealed in 2003) provided that "the [criminal investigation authorities] shall be bound to take the necessary measures to prevent a criminal offence, for which there is reason to believe that it will be committed. [These measures may include] the temporary impounding of the means which could be used for committing the offence". The new Code of Criminal Procedure of 2005, which entered into force on 29 April 2006 and superseded the CCrP, does not contain a provision similar to that of the former Article 185 § 1 of the CCrP.

38. Section 119(1)(6) of the Judicial Power Act of 1994 provides that in carrying out their duties prosecutors "may take all measures provided for by law, if they have information that a publicly prosecutable criminal offence or other illegal act may be committed". The text of section 119(1)(6) of the Judicial Power Act of 1994 closely matches that of section 7(1) of the

repealed Prosecutor's Office Act of 1980 („Закон за прокуратурата"), which provided that in case he or she "had information that a criminal offence or another illegal act might be committed, the prosecutor shall issue a warning and take all legally permissible measures to prevent those".

39. There is no reported case-law on the exact import of these texts. During their 2002 visit to Bulgaria the Committee for the Prevention of Torture were told, while visiting a psychiatric hospital, that prosecutors had relied on Article 185 § 1 of the CCrP to order the confinement of individuals there (CPT/Inf (2004) 21, p. 53, § 150 *in limine* and footnote 12).

3. Powers of the Prosecutor's Office to institute civil proceedings to safeguard the public interest

40. Article 27 § 1 of the CCP, as worded at the material time, provided that prosecutors could, *inter alia*, commence a civil action on behalf of another person or entity if they considered that this was necessary to protect the State or the public interest.

4. Review of prosecutorial action

41. By section 117 of the Judicial Power Act of 1994, prosecutors are independent of the courts in the performance of their duties. Section 116(1) of the same Act provides that "all decisions and actions of a prosecutor may be appealed before the higher prosecutor's office, unless they are subject to judicial review", which is the case in respect of some of their decisions made in the course of criminal investigations (for instance under Articles 153a § 3, 237 § 3 and 239 § 7 of the CCrP).

42. Article 181 § 1 of the CCrP provides that prosecutors' decisions are appealable before the higher prosecutor. The appeal may be filed either through the prosecutor whose decision is appealed against, or directly with the higher prosecutor. In the former case, the appeal must be forwarded immediately to the competent prosecutor together with a written opinion by the lower prosecutor (Article 182 of the CCrP). The filing of the appeal has no suspensive effect unless the competent prosecutor decides otherwise. The higher prosecutor must rule on the appeal within three days of its receipt (Article 183 of the CCrP).

43. The Supreme Administrative Court has held that prosecutors' decisions are generally not subject to judicial review, because they are not administrative decisions as the Prosecutor's Office is part of the judicial branch, its task is the defence of legality, it is a centralised structure, and all prosecutorial decisions and actions may be appealed before the higher prosecutors. Unlike the decisions of the administrative authorities, which are subject to judicial review unless otherwise provided by statute, prosecutors' decisions may be scrutinised by the courts only in the cases

expressly provided for by law, which is not the case in respect of decisions made under section 119 of the Judicial Power Act of 1994 (опр. № 10697 от 25 ноември 2003 г. по адм. д. 4844/2003 г., ВАС, пето отделение; опр. № 3815 от 27 април 2005 г. по адм. д. № 3033/2005 г., ВАС, петчленен състав; опр. № 5065 от 2 юни 2005 г. по адм. д. № 11114/ 2004 г., ВАС, петчленен състав).

B. The Transformation and Privatisation of State and Municipally-Owned Enterprises Act of 1992

44. Paragraph 8 of the transitional and concluding provisions of that Act („Закон за преобразуване и приватизация на държавни и общински предприятия"), now superseded by new legislation, provided that all contracts disposing of State or municipal property which had been entered into under manifestly disadvantageous conditions could be annulled.

C. Relevant provisions of the Criminal Code of 1968

45. By Article 323 § 2 of the Criminal Code of 1968, it is an offence for any person to take possession of an immovable property from which they have been lawfully removed.

D. Civil remedies against unlawful state action

1. The State Responsibility for Damage Act of 1988

46. The principal enactment in this field is the State Responsibility for Damage Act of 1988 („Закон за отговорността на държавата за вреди, причинени на граждани"). Its section 1, as worded until 31 December 2005, provided as follows:

> "1. The State shall be liable for the damage suffered by private persons as a result of unlawful decisions, actions or omissions by its organs and officers, committed in the course of or in connection with the performance of administrative action.
>
> 2. Compensation for damage flowing from unlawful decisions under [subsection 1] may be claimed after the decisions concerned have been annulled [in prior proceedings]. If the damage flows from an administrative decision which is null and void or from a act or omission which is unlawful, the nullity of the decision or the unlawfulness of the act or the omission shall be established by the court having cognisance of the claim for compensation."

47. Section 1 was amended with effect from 1 January 2006 and now expressly provides that juristic persons may also claim compensation under the Act. Previously the courts construed this provision as allowing only natural persons to claim compensation (реш. № 1307 от 21 октомври

2003 г. по гр.д. № 2136/2002 г., ВКС, пето г.о.; тълк. реш. № 3 от 22 април 2005 г. по гр.д. № 3/2004 г., ОСГК на ВКС).

2. The Obligations and Contracts Act of 1951

48. The general rules of the law of torts are set out in sections 45 to 54 of the Obligations and Contracts Act of 1951 („Закон за задълженията и договорите“). Its section 45(1) provides that everyone is obliged to make good the damage which they have, through their fault, caused to another. Section 49 provides that a person who has entrusted another with performing a job is liable for the damage caused by that other person in the course of or in connection with the performance of the job.

49. Juristic persons are not liable under section 45(1) of the Act, as they cannot act with *mens rea*. They may, however, be vicariously liable under section 49 thereof for the tortuous conduct of individuals employed by them (пост. № 7 от 30 декември 1959 г., Пленум на ВС).

50. One of the prerequisites of the liability in tort under sections 45 to 50 of the Act is the wrongfulness of the impugned conduct (реш. № 567 от 24 ноември 1997 г. по гр.д. № 775/1996 г., ВС, петчленен състав).

THE LAW

I. ADMISSIBILITY OF THE APPLICATION

A. Alleged failure to exhaust domestic remedies

51. The respondent Government submitted that the applicant company had not exhausted the remedies available to it under Bulgarian law, as required by Article 35 § 1 of the Convention. Although as a legal entity it had no recourse to compensation under the State Responsibility for Damage Act of 1988, it could have made a claim under section 45 of the Obligations and Contracts Act of 1951. After all three levels of court had ruled in its favour, dismissing the action brought by the Sofia City Prosecutor’s Office and recognising it as the legitimate owner of the hotel, it could have claimed compensation for not being able to use and manage the property while the prosecutors’ decisions had been effective.

52. The applicant company submitted that it could have only availed itself of the remedy suggested by the Government if the prosecutors’ decisions had been annulled. However, they had not been annulled pursuant to the appeals to the higher prosecutors, nor was there any possibility for

their setting aside by a court, as evidenced by the Sofia City Court's reasoning in its decision of 11 February 1998.

53. The third-party Government submitted that, while they were not familiar with the exact wording of the legal provisions invoked by the respondent Government, they assumed that these applied to the relations between private parties. It was thus unclear whether they presented sufficient grounds to hold the State liable for prosecutorial action. Nor did it seem that the applicant company could, in the circumstances, sue the Sofia Municipality for breach of contract.

54. The Court notes at the outset that it was conceded by the respondent Government that the avenue of redress under section 1 of the State Responsibility for Damage Act of 1988 was not available to the applicant company at the material time, because it is a juristic person, whereas proceedings under that Act could, until 1 January 2006, only be brought by individuals (see paragraphs 46 and 47 above).

55. As regards the remedy to which the respondent Government pointed – a tort action under section 45(1) of the Obligations and Contracts Act of 1951 (see paragraph 48 above), the Court notes that under Bulgarian law the tortfeasor under that provision can only be a natural person, not a legal entity (see paragraph 49 above). It follows that the applicant company would not have been able to successfully bring proceedings against the State or the Sofia City Prosecutor's Office under that provision. Even assuming that the applicant company could have sued the prosecutors who made the decisions in issue in their personal capacity, which is fairly dubious (see paragraph 36 above), according to the Court's case-law suing a private individual cannot be regarded as a remedy in respect of an act on the part of the State (see *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, Series A no. 222, p. 22, § 48; and *Iatridis v. Greece* [GC], no. 31107/96, § 47 *in fine*, ECHR 1999-II).

56. Insofar as the respondent Government may be taken to submit that the applicant company could make a claim under section 49 of the Obligations and Contracts Act of 1951, which deals with tortuous liability for another's conduct, the Court observes that apparently one of the prerequisites for prosecuting successfully such a claim under Bulgarian law is establishing the wrongfulness of the conduct causing the damage (see paragraph 50 above). However, there is nothing to suggest that the prosecutors' decisions in issue contravened Bulgarian law. They were upheld by the higher prosecutors, whereas the courts would refuse to examine their lawfulness in a civil action, such as a one in tort, as is apparent from the reasoning of the Sofia City Court's decision of 11 February 1998 (see paragraphs 10, 11, 17 and 19 above). It thus seems that any such claim would have no prospects of success. The Court furthermore notes that the respondent Government did not refer to any domestic court judgments or doctrinal opinions in corroboration of their

averment that such a claim would provide an effective remedy in the circumstances, whereas it is incumbent on a Government claiming non-exhaustion to satisfy the Court that the remedy it points to was effective and available in theory and in practice at the relevant time (see, as a recent authority, *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-...).

57. It follows that the respondent Government's objection must fail.

B. Alleged loss of the applicant company's victim status

58. The respondent Government argued that the application before the Court was moot, as the applicant company had won the case commenced against it by the Sofia City Prosecutor's Office.

59. The applicant company submitted that its application related to the facts that no judicial review was available in respect of the prosecutors' decisions interfering with its property rights and that it could not use and manage the hotel, nor receive compensation for that impairment. The national courts' judgments in the action brought by the Sofia City Prosecutor's Office did not touch upon these issues, as they were not part of the subject-matter of the case.

60. The third-party Government did not comment on this issue.

61. The Court considers that the respondent Government's submission is to be taken as an averment that the applicant company had lost its victim status under Article 34 of the Convention on account of the favourable end of the civil proceedings against it. It observes, however, that the company's complaint under Article 1 of Protocol No. 1 relates to the prosecutors' decisions which interfered with its property rights. These decisions were not part of the matters under examination in the civil proceedings against the company, as the Sofia City Court refused to entertain the request for a declaration of their unlawfulness (see paragraph 19 above). It is true that the discontinuation of the operation of the prosecutors' decisions following, and possibly as a result of, the conclusion of these proceedings, brought the interference with the company's possessions to an end. However, it did not eliminate the intervening impossibility to use and manage the hotel for more than two years (see, *mutatis mutandis*, *Potop v. Romania*, no. 35882/97, § 37, 25 November 2003). Moreover, the company's grievances concern not only the interference with its possessions, but also the alleged impossibility, in breach of Article 6 § 1 of the Convention, to obtain judicial review of the prosecutors' decisions which brought about that interference (see, *mutatis mutandis*, *Brumărescu v. Romania* [GC], no. 28342/95, § 50, ECHR 1999-VII). Consequently, the favourable outcome of the proceedings for annulling the privatisation contract does not seem to have provided any redress in respect of the violations alleged in the present case.

62. It should also be noted that the authorities did not acknowledge at any point, either expressly or in substance, the alleged violations.

63. The respondent Government's second objection must therefore likewise be dismissed.

C. The Court's decision on admissibility

64. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that, as found above, it is not inadmissible on any other grounds. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

65. The applicant company complained under Article 6 § 1 of the Convention that the prosecutors' decisions interfering with its right to use its possessions could not be reviewed by a court.

66. Article 6 § 1 reads, as relevant:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

A. The parties' submissions

67. The respondent Government submitted that the prosecutors' decisions were appealable before the higher prosecutors. They could also be reviewed by a court when the criminal proceedings reached the judicial stage, whereas it was obvious that there existed no possibility for their judicial review before that. On the other hand, once the national courts had dismissed the action brought by the Sofia City Prosecutor's Office in a final judgment, all prior prosecutors' decisions had ceased to be in force. The applicant company's demands that these decisions be expressly set aside by their issuing authorities were thus pointless. The said decisions had been rendered invalid through the civil proceedings, which had ensured the requisite access to a court.

68. The applicant company disputed the respondent Government's averment that the prosecutors' decisions were reviewable by a court. That was the case only in respect of criminal, not of civil proceedings as those at issue in the instant case, as was evident from the refusal of the Sofia City Court to entertain the Sofia Municipality's request for a declaratory judgment. The courts' judgments in the civil proceedings against the company did not address the lawfulness of the prosecutors' decisions and did not in fact set them aside.

69. The third-party Government submitted that apparently no possibility for judicial review of the prosecutors' decisions existed, as they could only

be hierarchically appealed before the higher prosecutors. According to them, the alleged indirect effect of the courts' judgments delivered in the proceedings for annulling the privatisation contract was not sufficient.

B. The Court's assessment

1. Applicability

70. The first matter for decision is the applicability of Article 6 § 1.

(a) Criminal charge

71. The Court notes that the measures taken by the Sofia City Prosecutor's Office did not involve a finding of guilt, but were rather designed, as is apparent from the wording of the provisions on which they were grounded and the reasons given, to prevent the future commission of offences and safeguard the public interest in the privatisation process (see paragraphs 8, 15, 37 and 38 above). They were thus not comparable to a criminal sanction (see, *mutatis mutandis*, *Arcuri and Others v. Italy* (dec.), no. 52024/99, ECHR 2001-VII, with further references). Furthermore, it does not appear from the file that any relevant criminal charges were brought against officers of the applicant company or any third party. Even assuming, however, that to be the case, this does not attract the application of Article 6 § 1 under its criminal limb in respect of the applicant company (see *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, p. 22, § 65 *in fine*).

(b) Civil rights and obligations

72. It remains to be established whether the measures taken by the Sofia City Prosecutor's Office against the applicant company concerned its civil rights and obligations, within the meaning of Article 6 § 1 (see, *mutatis mutandis*, *Allan Jacobsson v. Sweden (no. 1)*, judgment of 25 October 1989, Series A no. 163, pp. 19-21, §§ 66-74). The Court observes on this point that the ordered suspension of the performance of the privatisation contract and the eviction of the applicant company from the hotel had a clear and decisive impact on its capability to use and operate it, which was undoubtedly an exercise of a civil right (see, *mutatis mutandis*, *Fredin v. Sweden (no. 1)*, judgment of 18 February 1991, Series A no. 192, p. 20, § 63). The Court also finds that a real dispute existed, in particular with regard to the lawfulness of the Sofia City Prosecutor's Office's decisions: before the higher levels of the Prosecutor's Office, the applicant company – as well as the Sofia Municipality – claimed that these decisions were not in conformity with the relevant legal provisions (see paragraphs 10, 11, 26 and 28 above; see also *Skärby v. Sweden*, judgment of 28 June 1990, Series A

no. 180-B, p. 37, § 28 *in fine*). The outcome of this dispute, which was determined solely by the various levels of the Prosecutor's Office, was directly decisive for the company's exercise of the right to use and manage the hotel. It follows that Article 6 § 1, under its civil head, was applicable.

2. Compliance

73. Under Article 6 § 1 it is necessary that, in the determination of civil rights and obligations, decisions taken by authorities which do not themselves satisfy its requirements be subject to subsequent control by a judicial body that has full jurisdiction (see, among many other authorities, *Fischer v. Austria*, judgment of 26 April 1995, Series A no. 312, p. 17, § 28; and *Credit and Industrial Bank v. the Czech Republic*, no. 29010/95, § 68, ECHR 2003-XI (extracts)).

74. Therefore, the first issue which needs to be settled by the Court is whether the various prosecutor's offices involved could, in the circumstances, be considered as tribunals conforming to the requirements of Article 6 § 1. This assessment is to be carried out without regard to their role in criminal proceedings, where they are clearly not one, as a plurality of powers cannot in itself preclude an institution from being a tribunal in respect of some of them (see *H. v. Belgium*, judgment of 30 November 1987, Series A no. 127-B, p. 35, § 50).

75. A tribunal, within the meaning of Article 6 § 1, is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner (ibid., p. 34, § 50). It must also satisfy a series of requirements – independence, in particular of the executive, impartiality, duration of its members' terms of office, and guarantees afforded by its procedure – several of which appear in the text of Article 6 § 1 (see, as a recent authority, *Mihailov v. Bulgaria*, no. 52367/99, § 37, 21 July 2005, with further references).

76. The Court notes that the Prosecutor's Office is independent of the executive and that prosecutors enjoy the same tenure and immunities as do judges (see paragraph 33 above). However, that cannot be seen as dispositive, as an independent and impartial tribunal within the meaning of Article 6 § 1 exhibits other essential characteristics – such as the guarantees of judicial procedure (see *Benthem v. the Netherlands*, judgment of 23 October 1985, Series A no. 97, p. 18, § 43 *in limine*) – which are lacking here. It should firstly be noted in this connection that the Sofia City Prosecutor's Office made the impugned decisions of its own motion, whereas a tribunal would normally become competent to deal with a matter if it is referred to it by another person or entity. Moreover, it appears that the making of the decisions did not have to be – and was, in fact, not – attended by any sort of proceedings involving the participation of the entity concerned, i.e. the applicant company. The law made no provision for the

holding of hearings, and did not lay down any rules on such matters as the admissibility of evidence or the manner in which the proceedings were to be conducted (see *H.*, cited above, p. 35, § 53). Finally, it appears from the wording of the relevant legal provisions (see paragraphs 37 and 38 above) that the Sofia City Prosecutor's Office enjoyed considerable latitude in determining what course of action to pursue, which appears hardly compatible with the notions of the rule of law and legal certainty inherent in judicial proceedings (see, *mutatis mutandis*, *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 82, ECHR 2002-VII).

77. It is true that appeals could be made against these decisions to the higher levels of the Prosecutor's Office. However, they were the hierarchical superiors of the Sofia City Prosecutor's Office (see, *mutatis mutandis*, *Benthem*, cited above, p. 18, § 43 *in fine*) and part and parcel of the same centralised system under the overall authority of the Chief Prosecutor (see paragraph 34 above; see also, *mutatis mutandis*, *Vasilescu v. Romania*, judgment of 22 May 1998, *Reports of Judgments and Decisions* 1998-III, pp. 1075-76, § 40; and, as an example to the contrary, *H. v. Belgium*, cited above, p. 35, § 51). In this connection, the Court notes that it found, albeit in a different context, that similar appeals to the various levels of the Prosecutor's Office were not an effective remedy under Article 13 of the Convention, as they were, *inter alia*, hierarchical (see *Djangozov v. Bulgaria*, no. 45950/99, § 56, 8 July 2004; and *Osmanov and Yuseinov v. Bulgaria*, nos. 54178/00 and 59901/00, § 39, 23 September 2004). Moreover, it appears that the appeals procedure was not attended by due procedural safeguards (see paragraph 42 above; and *H. v. Belgium*, cited above, p. 35, § 53).

78. The Court further notes that in its judgment in the case of *Assenov and Others v. Bulgaria* it found that Bulgarian prosecutors could not be considered as officers authorised by law to exercise judicial power, within the meaning of Article 5 § 3 of the Convention, as they could subsequently act in criminal proceedings against the person whose detention they had confirmed (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, pp. 2298-99, §§ 144-50). It considers that a similar rationale should apply in the present case. The decisions ordering the suspension of the performance of the privatisation contract and the applicant company's eviction from the hotel were made by the Sofia City Prosecutor's Office of its own motion. It then brought, in exercise of its powers under Article 27 § 1 of the CCP, a civil action against the company, seeking the annulment of that same privatisation contract (see paragraphs 8, 15 and 18 above). It could thus hardly be deemed as sufficiently impartial for the purposes of Article 6 § 1 (see, *mutatis mutandis*, *Procola v. Luxembourg*, judgment of 28 September 1995, Series A no. 326, p. 16, § 45). The same goes for the higher levels of the Prosecutor's Office, which upheld these decisions and subsequently acted against the applicant

company in the proceedings before the Sofia Court of Appeals and the Supreme Court of Cassation (see paragraphs 23 and 24 above). The mere fact that the prosecutors acted as guardians of the public interest cannot be regarded as conferring on them a judicial status or the status of independent and impartial actors (see, *mutatis mutandis*, *Merit v. Ukraine*, no. 66561/01, § 63, 30 March 2004).

79. In view of the foregoing, the Court concludes that the various prosecutor's offices involved cannot, in the circumstances, be regarded as independent and impartial tribunals providing the guarantees required by Article 6 § 1.

80. It follows that in order for the obtaining situation to be in compliance with that provision, the prosecutors' decisions should have been subject to review by a judicial body having full jurisdiction. However, the Court notes that domestic law, as is apparent from the wording of the relevant provisions and from their reading by the Supreme Administrative Court, excludes judicial review of prosecutors' decisions made in exercise of their powers under the provisions on which they relied in the instant case (see paragraphs 41 and 43 above).

81. Insofar as the respondent Government argued that the requisite degree of judicial scrutiny was afforded through the civil action brought by the Sofia City Prosecutor's Office against the applicant company, the Court notes that the Sofia City Court expressly refused to examine the lawfulness of the prosecutors' decisions in these proceedings (see paragraph 19 above). This was only natural, as the issue to be decided therein – whether the privatisation contract with the applicant company had been made under manifestly disadvantageous conditions – was entirely different from that of the lawfulness of the impugned prosecutors' decisions. Consequently, the courts did not touch upon that issue in their reasoning or in the operative provisions of their judgments. Therefore, the respondent Government's suggestion that these proceedings could in a way be regarded as an appeal against the Sofia City Prosecutor's Office's decisions cannot be accepted by the Court (see, *mutatis mutandis*, *Werner v. Austria*, judgment of 24 November 1997, *Reports* 1997-VII, p. 2511, § 49). It is true that after their completion the Sofia City Prosecutor's Office eventually stated that its decisions were no longer operative (see paragraphs 31 and 32 above). However, this was by no means a direct result of a binding decision of the courts in these proceedings.

82. The Court is similarly unable to accept the respondent Government's averment that judicial review was available in the form of an appeal against the prosecutors' decisions to a criminal court if and when the criminal proceedings would reach the judicial stage. The decisions in issue were not made in the context, but prior to the institution of any criminal proceedings, and the respondent Government did not provide any examples from the national courts' case-law which would indicate that they are indeed

reviewable in such proceedings. On the contrary, it appears from the Supreme Administrative Court's jurisprudence that only a limited number of prosecutors' decisions made after the institution of criminal proceedings were reviewable by a court, pursuant to express provisions of the CCrP (see paragraph 43 above). The existence of an alleged judicial remedy must be sufficiently certain, failing which it will lack the accessibility and effectiveness required for the purposes of Article 6 § 1 (see *I.D. v. Bulgaria*, no. 43578/98, § 54, 28 April 2005; and *Capital Bank AD v. Bulgaria*, no. 49429/99, § 106, 24 November 2005).

83. The Court thus finds that the prosecutors' decisions in the case at hand – which were decisive for the applicant company's use and possession of the hotel at least until the end of the civil action against it – were not subject to judicial scrutiny, as required by Article 6 § 1.

84. The final question which needs to be resolved is whether the impossibility to seek judicial review of these decisions was not warranted in terms of the inherent limitations on the right of access to a court implicit in Article 6 § 1 (see *Capital Bank AD*, cited above, § 109). The Court notes in this connection that the respondent Government did not advance any reasons justifying the lack of access to a court. The rationale applied by the Supreme Administrative Court in rejecting as inadmissible applications for judicial review of prosecutors' decisions was confined to arguments relating to the status of the Prosecutor's Office (see paragraph 43 above). However, as the Court found above, that Office cannot be seen as being an independent and impartial tribunal within the meaning of Article 6 § 1. In these circumstances, the Court finds no justifiable reasons for excluding judicial review of its decisions interfering, as in the present case, with civil rights and obligations.

85. There has therefore been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

86. In the view of the applicant company, the facts underlying its complaint under Article 6 § 1 of the Convention also gave rise to a violation of Article 13 thereof, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

87. The Court does not consider it necessary to rule on this submission, because, where the right claimed is a civil one, the requirements of Article 13 are less strict than, and are absorbed by, those of Article 6 § 1 (see *Allan Jacobsson (no. 1)*, p. 21, § 78; *Vasilescu*, p. 1076, § 43; and *Capital Bank AD*, § 121, all cited above).

IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

88. The applicant company complained that the ordered suspension of the performance of the privatisation contract and its eviction from the hotel had been unlawful. It relied on Article 1 of Protocol No. 1 to the Convention, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. The parties' submissions

89. The respondent Government submitted that the applicant company had not been deprived of the ownership of the hotel, which it had already acquired by virtue of the privatisation contract, but had only been barred from using and managing it for a limited period of time. Following the conclusion of the civil proceedings against it it could have freely accessed the hotel.

90. In the respondent Government's view, the statutory provisions which had served as a basis for the impugned prosecutors' decisions were sufficiently clear and foreseeable and precluded any arbitrary action. Moreover, the aim of the decisions had been legitimate and the means used to that end had been proportionate. The statutory provisions in issue laid down general rules. They empowered the Prosecutor's Office to take all necessary measures to prevent the commission of criminal offences, including impounding of the means which could be used for perpetrating the offence. Since the possession of property alone could, in certain cases where the relevant privatisation regulations had been breached, constitute a criminal offence, the authorities were under a duty to intervene. The offence sought to be forestalled was one which could possibly be committed by the applicant company. At the same time, the only means to establish whether or not the municipal officials had already offended had been to suspend the performance of the privatisation contract. The prosecutors' right to request the annulment of a contract in case it violated general rules existed in other legal systems. For instance, under the French system the public prosecutors could also bring proceedings to protect the general interest. The Bulgarian practice in the privatisation domain was thus fully compatible with the universally acknowledged principles of nullity. Since the definition of the general interest was reserved for the national authorities – the legislature

and the courts –, the provisions in issue did not fall foul of the requirements of the Convention. The prescribed procedures ensured sufficient safeguards against arbitrary action, such as a possibility to appeal to the higher levels of the Prosecutor's Office and to a court in the event the criminal proceedings reached the judicial phase. The lack of suspensive effect of these appeals did not deprive them of their effectiveness. Moreover, all higher prosecutors had fully upheld the decisions in issue as lawful. The applicant company's request for them to be rescinded following the end of the civil proceedings against it had been misguided, as they had then already been rendered invalid.

91. The applicant company submitted that it did not challenge the powers of a prosecutor to take measures to prevent the commission of offences as such. However, this power had to be based on sufficient grounds, subject to scrutiny, not unduly violative of private interests, and accompanied by guarantees against arbitrariness. For more than seven years the competent prosecutors had not indicated which had been the offence which they had sought to prevent, who would have committed it and why it had been necessary to impound the hotel to avert it. No criminal charges had been preferred before a court. No criminal proceedings had been brought against the applicant company either. That option was unavailable under Bulgarian law anyway, since legal entities could not incur criminal liability. Finally, there was nothing to show that the prosecutors' decisions had become moot after the end of the civil proceedings against the applicant company; it had thus correctly requested their rescission.

92. The third-party Government submitted that the respondent Government had not provided any information or materials, such as judgments of the domestic courts, which could indicate with some level of certainty the scope of the prosecutors' powers under the provisions relied on in the instant case. These provisions spelled out general rules for preventing the commission of criminal offences. It was however unclear what offence, if any, could be committed by the applicant company in taking possession of the hotel. On the other hand, it did not seem that any relevant criminal proceedings had been opened against officials of the Sofia Municipality or officers of the applicant company.

B. The Court's assessment

1. Scope of the complaint

93. The Court notes at the outset that the applicant company's complaint did not concern the institution of civil proceedings against it by the Sofia City Prosecutor's Office, but merely that Office's decisions ordering the suspension of the performance of the privatisation contract and the eviction of the company from the hotel it had purchased thereby. It is hence

unnecessary to consider, as suggested by the respondent Government, the prosecutors' powers to seek the annulling, by the courts, of privatisation contracts allegedly made in breach of the State's interests. The Court will accordingly confine its examination to the impugned decisions of the Sofia City Prosecutor's Office.

2. Applicability of Article 1 of Protocol No. 1

94. It was not in dispute between those appearing before the Court that the decisions complained of constituted an interference with the peaceful enjoyment of the applicant company's possessions. However, the parties disagreed on the exact nature of that interference.

95. The Court notes that the company's eviction from the hotel amounted to a temporary restriction on its use and did not entail a transfer of ownership. It does not therefore consider that the case involves a deprivation of property (see, *mutatis mutandis*, *Air Canada v. the United Kingdom*, judgment of 5 May 1995, Series A no. 316-A, pp. 15-16, § 33).

96. In addition, it transpires from the reasoning of the decisions in issue and the surrounding circumstances that the eviction sought to forestall the divestiture of State assets under allegedly grossly disadvantageous conditions (see paragraphs 6-8 and 15 above). As such, it amounted to a control of the use of property. It is therefore the second paragraph of Article 1 of Protocol No. 1 which is applicable in the present case (ibid., p. 16, § 34).

3. Compliance with Article 1 of Protocol No. 1

97. The first and most important requirement of Article 1 of Protocol No. 1, whichever the applicable rule thereof, is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions only "subject to the conditions provided for by law" and the second paragraph recognises that the States have the right to control the use of property by enforcing "laws". Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II; *Carbonara and Ventura v. Italy*, no. 24638/94, § 63, ECHR 2000-VI; and *Capital Bank AD*, cited above, § 133).

98. The requirement of lawfulness, within the meaning of the Convention, means not only compliance with the relevant provisions of domestic law, but also compatibility with the rule of law. It thus presupposes that the rules of domestic law must be sufficiently precise and foreseeable (see *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A, pp. 19-20, § 42; and *Beyeler v. Italy* [GC], no. 33202/96, § 109, ECHR 2000-I). It also implies that the law must

provide a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention (see *Capital Bank AD*, cited above, § 134, with further references). It would be contrary to the rule of law for the legal discretion granted to the authorities in areas affecting fundamental rights to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion and the manner of its exercise with sufficient clarity, so as to give the affected individuals and entities adequate protection against arbitrary interference (see, *mutatis mutandis*, *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI, with further references). Finally, the concepts of lawfulness and the rule of law in a democratic society command that measures affecting fundamental human rights be accompanied by appropriate procedural safeguards. In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures (see *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, p. 19, § 55; *Hentrich*, cited above, p. 21, § 49; and *Jokela v. Finland*, no. 28856/95, § 45, ECHR 2002-IV).

99. The provisions on which the Sofia City Prosecutor's Office relied to order the suspension of the performance of the privatisation contract and the eviction of the applicant company from the hotel, former Article 185 § 1 of the CCrP and section 119(1)(6) of the Judicial Power Act of 1994, appear on their face to be rather concerned with situations where it is necessary to impound physical things which may serve for the commission of a criminal offence or are intended for use in illegal activities (see paragraphs 37 and 38 above). According to the applicant company, as well as the Sofia Municipality, that Office's decisions in the case at hand fell outside the purview of these provisions and were thus unlawful in terms of Bulgarian law (see paragraphs 10, 11, 17, 19 and 91 above). According to the Government, the very possession of a thing could constitute an offence, with the result that the decisions were lawful (see paragraph 90 above). The Court would be usurping the function of the national courts were it to attempt to make an authoritative statement on this issue of domestic law. It is, however, required under the Convention to determine whether that law lays down with reasonable clarity the essential elements of the authorities' powers (see *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82, p. 36, § 79). It notes in this connection that the above-mentioned statutory provisions used particularly vague terms (see paragraphs 37 and 38 above), which made it almost impossible to foresee under what conditions the competent prosecutors will choose to act and what measures they will take in the event they considered, without independent control, that an offence might be committed. It is true that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. However, there is no reported case-law interpreting and clarifying

the exact import of the provisions at issue, in all probability on account of the impossibility of judicial review of prosecutors' decisions as the ones at hand (see paragraphs 41 and 43 above). As a result, these rules, which appear to be of general application, serve as a catchall, giving the Prosecutor's Office unfettered discretion to act in any manner it sees fit, which may in some cases have serious and far-reaching consequences for the rights of private individuals and entities (see paragraph 39 above). This discretion and the concomitant lack of adequate procedural safeguards, such as elemental rules of procedure and, as already found by the Court (see paragraphs 77, 78 and 81-83 above), review by an independent body, and the resulting obscurity and uncertainty surrounding the powers of the Prosecutor's Office in this domain, lead the Court to conclude that the minimum degree of legal protection to which individuals and legal entities are entitled under the rule of law in a democratic society was lacking. It follows that the interference with the applicant company's possessions was not lawful, within the meaning of Article 1 of Protocol No. 1.

100. This conclusion makes it unnecessary to ascertain whether the other requirements of that provision have been complied with (see *Iatridis*, cited above, § 62).

101. There has therefore been a violation of Article 1 of Protocol No. 1 to the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. 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

103. The applicant company claimed USD 2,729,660 as compensation for pecuniary damage. This amount broke down as follows:

(i) USD 140,618 in respect of the material damage which the hotel sustained during the two years it was left unattended. According to an expert report drawn up by a damage assessment firm, 75% of the building were unfit for use and 82% to 90% of its installations were inoperative;

(ii) USD 2,587,827 in respect of loss of profits. That amount was arrived at on the basis of another expert report drawn up by an accounting firm;

(iii) USD 1,214 in respect of missing equipment, as ascertained in the first expert report.

104. The applicant company submitted that the damage claimed was the direct result of its eviction from the hotel and the fact that the building was left unattended. It produced two expert reports, the first describing and assessing the damage to the hotel at the end of 1999, and the other estimating the loss of profits stemming from the impossibility to operate the hotel during the period 1997-99.

105. The respondent Government submitted that the applicant company's claims were not in line with the Court's case-law on the impounding of assets during the pendency of judicial proceedings. According to this case-law, no compensation was due for periods during which a piece of property was seized, even by a prosecutor. Consequently, no obligation arose for the State to make good the alleged loss of profits resulting from the eviction during the pendency of the civil action against the applicant company. The only period in respect of which the applicant company could validly claim compensation was that which followed the dismissal of the action in a final judgment. However, it was evident that no interference with its possessions had occurred at that time, as the prosecutors' decisions had become moot after the favourable end of the civil proceedings. Furthermore, the applicant company's claim was clearly excessive and based on unreliable expert reports. The first expert report produced by the applicant company, relating to the material damage to the hotel, was not signed, but merely sealed. The other expert report, relating to the alleged loss of profits, did not set out the underlying methodology, as was customary for such forensic reports, and was, moreover, unsupported by evidence. It was likewise unsigned. As there was thus no individual responsible for the truthfulness of the conclusions in the expert reports, they could not be deemed reliable.

106. In the circumstances of the case, the Court considers that the question of the application of Article 41 of the Convention is not ready for decision as regards pecuniary damage and reserves it, due regard being had to the possibility that an agreement between the respondent State and the applicant company will be reached (Rule 75 § 1 of the Rules of Court).

B. Costs and expenses

107. The applicant company sought the reimbursement of USD 5,505 it had incurred for costs and expenses. This amount broke down as follows:

(i) USD 165 in attorney fees for five and a half hours of legal work before the Sofia City and Appellate Prosecutor's Offices and USD 1,985 for seventy-seven hours of legal work on the Strasbourg proceedings, at the rates of USD 5, 10, 30 per hour, depending on the type of work;

(ii) USD 2,000 in fees for procuring expert reports on the extent of the damages sustained by the applicant company;

(iii) USD 1,060 for translation costs (allegedly USD 180 and 240 Bulgarian levs (BGN) for the translation of the above-mentioned expert reports, and BGN 1,080 for the translation of other documents);

(iv) USD 115 for postage;

(v) USD 80 for copying, telephone and fax expenses.

108. The respondent Government did not comment.

109. According to the Court's case-law, applicants are entitled to the reimbursement of their costs and expenses only insofar as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, and converting the applicant company's claim into euros (EUR), the Court considers it reasonable to award the sum of EUR 2,400, plus any tax that may be chargeable, covering attorney fees, translation of documents other than the expert reports, postage and copying, telephone and fax expenses (see items (i), (iii), (iv) and (v) in paragraph 107 above).

110. As to the amount claimed in respect of the expert reports and their translation into English (see items (ii) and (iii) in paragraph 107 above), the Court considers that this part of the applicant company's claim for costs and expenses is closely linked to its claim for pecuniary damages and is accordingly not ready for decision either. Therefore, the Court likewise reserves the question of the application of Article 41 of the Convention in so far as the costs incurred for the expert reports and their translations are concerned (see *Kehaya and Others v. Bulgaria*, nos. 47797/99 and 68698/01, § 97, 12 January 2006).

C. Default interest

111. 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

1. *Declares* unanimously the application admissible;

2. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* by six votes to one that it is not necessary to rule on the allegation of a violation of Article 13 of the Convention;

4. *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

5. *Holds* unanimously
(a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 2,400 (two thousand four hundred euros) in respect of costs and expenses, to be converted into Bulgarian levs at the rate applicable at the date of settlement, plus any tax that may be chargeable on that amount;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Holds* unanimously that the question of the application of Article 41 of the Convention is not ready for decision in so far as pecuniary damage and costs for the expert reports and their translation are concerned;
accordingly,
(a) *reserves* the said question;
(b) *invites* the respondent Government and the applicant company to submit, within six months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
(c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be;

7. *Dismisses* unanimously the remainder of the applicant company's claim for just satisfaction.

Done in English, and notified in writing on 15 June 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Maruste is annexed to this judgment.

P.L.
C.W.

PARTLY DISSENTING OPINION OF JUDGE MARUSTE

1. In this case the majority found a violation of Article 6 § 1 of the Convention and decided that it was not necessary to rule on the allegation of a violation of Article 13 thereof. It found that there had been a violation of Article 1 of Protocol No 1. I disagreed with the majority in respect of Article 13 because, to my mind, the main problem of the case was not the fairness of the trial, but the lack of effective remedies against the impugned Prosecutor's Office's decisions and the fact that there was no possibility of obtaining compensation for the damage caused by its actions.

2. The first thing which needs to be pointed out is the somewhat confused nature of the actions of the Prosecutor's Office. Initially it relied on Article 185 § 1 of the Code of Criminal Procedure of 1974, which gives the impression that criminal proceedings were initiated. Later it became clear that a criminal investigation had indeed been opened; however, not against the applicant company, but against an official of the Sofia Municipality. Serious allegations of infringing important public interests and public order were also levelled against the Sofia Municipality. The first tangible procedural steps against the applicant company were taken on 6 October 1997, when the police sealed off the hotel. At that stage the steps taken were investigative actions by the prosecution (principally against the municipality) of a type which prosecution authorities everywhere are generally entitled to take. It has to be noted clearly that at that point these amounted only to an investigation, not to a trial or a judicial final determination of someone's civil rights. It was rather a criminal investigation which had direct implications for the applicant company's property rights. Such steps could, in principle, be viewed as a legitimate control of the use of property. The direct determination of the applicant company's civil rights started when the Prosecutor's Office, exercising its legal powers, brought a civil action against the Sofia Municipality and the applicant company, seeking the annulment of the privatisation contract. Full-scale judicial proceedings commenced, whose conformity with the requirements of Article 6 § 1 has never been challenged by the applicant company. The final decision in these proceedings was favourable to the company.

3. It transpires from the facts of the case that the applicant company never challenged the Prosecutor's Office's actions before the domestic courts. The facts as set out in the judgment do not indicate that they ever argued about access to a court either. The legality of the Prosecutor's Office's actions was challenged on 9 December 1997 by the Sofia Municipality, which argued that they did not have a sufficient legal basis and were *ultra vires*. The applicant company appealed several times, but only to the higher prosecutor's offices, complaining, *inter alia*, of a breach of its rights under Article 1 of Protocol No. 1 on account of the prohibition on the use of its property (the hotel) for nearly two years, which infringed its right to peacefully enjoy its possessions.

4. In any event, several things seem to be clear: (i) As a direct consequence of the Prosecutor's Office's actions (it has not been established whether they were lawful or not, but it may be presumed that they were lawful) the applicant company suffered pecuniary damage; (ii) Under the existing legislation and legal practice at the material time, juristic persons were not considered as victims of criminal proceedings initiated against them and were not entitled to any compensation for the pecuniary damage caused by such proceedings; (iii) The domestic court (the Sofia City Court) ruled on 11 February 1998 that it had no jurisdiction to examine the lawfulness of the prosecutors' decisions and actions in civil proceedings. Consequently, the main problem for the applicant company was the lack of an effective remedy to protect their Convention rights. It follows that there has also been a violation of Article 13 of the Convention.