[TRANSLATION]

…

THE FACTS

The applicants are

– in the case of application no. 6422/02: Segi, an association based in Bayonne (France) and San Sebastián (Spain), and the association's two spokespersons, Ms Araitz Zubimendi Izaga, a Spanish national, member of the Basque autonomous parliament, who lives in Hernani (Guipuzcoa province), and Mr Aritza Galarraga, a French national living in Senpere (*département* of Pyrénées-Atlantiques);

– in the case of application no. 9916/02: Gestoras Pro-Amnistía, an association based in Hernani (Guipuzcoa province), and the association's two spokespersons, Mr Juan Mari Olano Olano, a Spanish national, currently detained in Gradignan remand prison (*département* of Gironde), and Mr Julen Zelarain Errasti, a Spanish national, currently a prisoner in Soto del Real Prison (Madrid province).

The applicants were represented before the Court by Mr D. Rouget, a lawyer practising in Bayonne.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

(a) Segi (meaning "Continue") was set up on 16 June 2001. At the constituent general meeting on that date it appointed as its spokespersons Ms Araitz Zubimendi Izaga and Mr Aritza Galarraga. They are authorised to act on the association's behalf and to represent it.

Segi describes itself as the movement of Basque youth. It has members in all the provinces of the Basque lands in France and in Spain. Its aims are to campaign on youth issues and protect the Basque identity, Basque culture and the Basque language. It asserts that it works through democratic channels to ensure respect for fundamental rights, both collective and individual. It campaigns for the right to self-determination and a negotiated political solution to the Basque conflict. It fights for a fairer, more mutually supportive society by combating inequality and discrimination, racism, sexism and homophobia. It combats the oppression of youth, drug trafficking, social insecurity, poverty and violence against young people. It promotes the social, cultural and political expression of young people by organising events, rallies, festivals and concerts.

In a decision of 5 February 2002, central investigating judge no. 5 at the *Audiencia Nacional* in Madrid ordered the suspension of the association's activities as a preventive measure on the ground that it was "an integral part of the Basque terrorist organisation ETA-EKIN". In a decision of 11 March 2002 he further ordered the detention pending trial of eleven of the association's leaders, including the applicant Aritza Galarraga, charged with terrorism-related activities punishable under the Spanish Criminal Code; he referred to Common Position 2001/931/CFSP of the Council of the European Union.

(b) Gestoras Pro-Amnistía is a non-governmental organisation for the protection of human rights in the Basque lands, particularly those of political prisoners and exiles.

Mr Juan Mari Olano Olano and Mr Julen Zelarain Errasti have been appointed as its spokesmen.

In a decision of 19 December 2001, central investigating judge no. 5 at the *Audiencia Nacional* in Madrid ordered the suspension of the association's activities as a preventive measure on the ground that it was "an integral part of the Basque separatist organisation ETA". The association appealed.

Common Positions 2001/930/CFSP and 2001/931/CFSP of 27 December 2001

On 27 December 2001 the representatives of the fifteen member States, meeting as the Council of the European Union, adopted in the context of the Common Foreign and Security Policy (CFSP) the following two common positions:

– Common Position 2001/930/CFSP "on combating terrorism". This contains measures of principle to be taken by the European Union and its member States to combat terrorism. Article 14 of Common Position 2001/930/CFSP recommends that member States become parties as soon as possible to the international conventions and protocols relating to terrorism listed in an annex. These include the Council of Europe's European Convention on the Suppression of Terrorism of 27 January 1977, which came into force on 4 August 1978;

– Common Position 2001/931/CFSP "on the application of specific measures to combat terrorism".

These two common positions took effect on the date of their adoption. They were published in the Official Journal of the European Communities (OJEC) on 28 December 2001.

Common Position 2001/931/CFSP is addressed to both the European Community (Articles 2 and 3, relating to the freezing of funds, which affects the free movement of capital, a Community matter) and the member States (Article 4, relating to police and judicial cooperation in criminal

matters, which is not a question for the Community). Article 1 states that the common position applies to "persons, groups and entities involved in terrorist acts" who are listed in its annex. The names of both the applicant associations appear on the annexed list. However, according to the list, they are subject to Article 4 of the position only.

Article 4 of Common Position 2001/931/CFSP provides:

> "Member States shall, through police and judicial cooperation in criminal matters within the framework of Title VI of the Treaty on European Union, afford each other the widest possible assistance in preventing and combating terrorist acts. To that end they shall, with respect to enquiries and proceedings conducted by their authorities in respect of any of the persons, groups and entities listed in the Annex, fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon member States."

Council Regulation (EC) no. 2580/2001 of 27 December 2001 "on specific measures directed against certain persons and entities with a view to combating terrorism" implemented Articles 2 and 3 of the common position as regards their provisions on the freezing of funds.

B. Elements of European Community and European Union law

1. The Common Foreign and Security Policy (CFSP)

The provisions concerning a Common Foreign and Security Policy (CFSP), designated as the second pillar of the European Union, were introduced by the Treaty on European Union of 7 February 1992, known as the Maastricht Treaty ("the EU Treaty"). They were modified on 2 October 1997 when the member States adopted the Amsterdam Treaty, which came into force on 1 May 1999. The CFSP is therefore at present provided for in Title V of the EU Treaty.

Under the CFSP the Council, which consists of a representative of each member State at ministerial level, authorised to commit the government of that member State (Article 203 § 1 of the Treaty establishing the European Community), takes various types of decision, particularly joint actions (Article 14 of the EU Treaty) and common positions (Article 15 of the EU Treaty). These common positions define the approach of the Union to a particular matter of a geographical or thematic nature. Member States must ensure that their national policies conform to the common positions.

Article 23 of the EU Treaty provides that decisions under the CFSP are to be taken by the representatives of the member States, either unanimously, under paragraph 1, or by a qualified majority, under paragraph 2. Where a member State declares that, for important and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by a qualified majority, no vote is taken. The Council, acting by a qualified

majority, may request that the matter be referred to the European Council, for decision by unanimous vote.

In both cases, whether unanimity or qualified majority, the opposition of a single State prevents the taking of a decision under the CFSP.

CFSP decisions are therefore intergovernmental in nature. By taking part in their preparation and adoption each State engages its responsibility. That responsibility is assumed jointly by the States when they adopt a CFSP decision.

2. Cooperation in the fields of justice and home affairs

Police and judicial cooperation in criminal matters (known as Justice and Home Affairs Policy – "JHA" or the third pillar) is now provided for by Title VI of the EU Treaty, as modified by the Amsterdam Treaty. In the context of such cooperation the Council can take common positions and promote cooperation contributing to the pursuit of the objectives of the Union, using the appropriate form and procedures.

3. Legal nature and judicial review of common positions

The Union's actions in the field of the CFSP and JHA have a strongly intergovernmental character. The instruments through which the CFSP is mediated are joint actions and common positions.

Common positions are intended to strengthen and improve the coordination of cooperation between the member States, which are supposed to apply and defend them. Adopted by the Council of the Union, they are Community acts which require member States to conduct national policies consistent with the approach laid down by the Union in a particular field. They are therefore not directly applicable, as such, in the member States, and their implementation requires the adoption by each member State of concrete domestic provisions in the appropriate legal form.

Decisions taken by the States' representatives under the CFSP are not subject to judicial review within the European Union, since by virtue of Article 46 of the EU Treaty the Court of Justice of the European Communities is not empowered to review the lawfulness of decisions taken in the field of the CFSP.

A Justice and Home Affairs issue may not be referred to the Court of Justice except in the form of a request for a preliminary ruling under the conditions laid down in Article 35 of the EU Treaty.

COMPLAINTS

Referring to Common Positions 2001/930/CFSP and 2001/931/CFSP, adopted on 27 December 2001 by the Council of the European Union, the applicant associations complained that, as individual applicants, they were unable to challenge in the Court of Justice of the European Communities the decisions and measures taken jointly by the fifteen member States in the context of those common positions.

Segi submitted in particular that these common positions directly and personally infringed its rights under the Convention. The member States had described it as a terrorist organisation. Its right to the presumption of innocence had been flouted. Its assets and the use of them were under threat. Its right to freedom of expression had been infringed. Its freedom of action as an association had been directly challenged. Its right to a hearing by a tribunal and its right to a fair trial had been denied. Its right to an effective remedy did not exist. Lastly, it was unable to obtain compensation for the very serious prejudice it had suffered on account of the common positions adopted by the member States on 27 December 2001. Segi asked the Court to find violations by the fifteen States of Article 6, Article 6 § 2 and Articles 10, 11 and 13 of the Convention and Article 1 of Protocol No. 1.

The other two applicants, the association's spokespersons, asked the Court to find violations by the fifteen States of Articles 6, 8, 10, 11 and 13 of the Convention.

Gestoras Pro-Amnistía complained in substance of the same violations, relying on Article 6, Article 6 § 2, Article 6 § 1 read in conjunction with Article 3 and Articles 10, 11 and 13 of the Convention and Article 1 of Protocol No. 1.

The other two applicants, the association's spokesmen, relied on Articles 6, 8, 10, 11 and 13 of the Convention.

THE LAW

Segi complained that it had been described by the fifteen member States of the European Union as a terrorist organisation. Its right to the presumption of innocence had been flouted. Its assets and the use of them were under threat. Its right to freedom of expression had been infringed. Its freedom of action as an association had been directly challenged. Its right to a hearing by a tribunal and its right to a fair trial had been denied. Its right to an effective remedy did not exist. Lastly, it was unable to obtain compensation for the very serious prejudice it had suffered on account of

the common positions adopted by the member States on 27 December 2001. Segi asked the Court to find violations by the fifteen States of Article 6, Article 6 § 2 and Articles 10, 11 and 13 of the Convention and Article 1 of Protocol No. 1.

The other two applicants, the association's spokespersons, asked the Court to find violations by the fifteen States of Articles 6, 8, 10, 11 and 13 of the Convention.

Gestoras Pro-Amnistía alleged in substance the same violations, relying on Article 6, Article 6 § 2, Article 6 § 1 read in conjunction with Article 3 and Articles 10, 11 and 13 of the Convention and Article 1 of Protocol No. 1.

The other two applicants, the association's spokesmen, relied on Articles 6, 8, 10, 11 and 13 of the Convention.

The Court notes that the present applications concern the ways in which the applicants were affected, allegedly in a manner incompatible with certain rights guaranteed by the Convention, by Common Position 2001/930/CFSP on combating terrorism and Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, both adopted by the Council of the European Union on 27 December 2001. The applicants claimed to be both direct and potential victims of the texts concerned.

The Court does not consider it necessary to rule on the question whether the applicants exhausted the remedies which the European Union could offer them, such as a compensation claim or even an application for annulment, in the light of the judgment of 3 May 2002 given by the Court of First Instance of the European Communities in *Jégo-Quéré et Cie S.A. v. Commission of the European Communities* (case T-177/01).

That is because the applications are in any event inadmissible for the following reasons.

The Court reiterates that Article 34 of the Convention "requires that an individual applicant should claim to have been actually affected by the violation he alleges" and "does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law *in abstracto* simply because they feel that it contravenes the Convention. In principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been applied to his detriment" (see *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, pp. 17-18, § 33).

Moreover, the European Commission of Human Rights has expressed the following view: "It can be observed from the terms 'victim' and 'violation' and from the philosophy underlying the obligation to exhaust domestic remedies provided for in Article 26 that in the system for the protection of human rights conceived by the authors of the Convention, the exercise of

the right of individual petition cannot be used to prevent a potential violation of the Convention: in theory, the organs designated by Article 19 to ensure the observance of the engagements undertaken by the Contracting Parties in the Convention cannot examine – or if applicable, find – a violation other than *a posteriori*, once that violation has occurred. ... It is only in highly exceptional circumstances that an applicant may nevertheless claim to be a victim of a violation of the Convention owing to the risk of a future violation" (see *Tauira and Others v. France*, no. 28204/95, Commission decision of 4 December 1995, Decisions and Reports 83-B, p. 130).

The Court has, for example, accepted that an applicant may be a potential victim in the following cases: where he was not able to establish that the legislation he complained of had actually been applied to him, on account of the secret nature of the measures it authorised (see *Klass and Others*, cited above); where a law prohibiting homosexual acts was capable of being applied to a certain category of the population, which included the applicant (see *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45); lastly, where an alien's deportation had been ordered but not yet enforced and where enforcement of the order would have exposed him, in the receiving country, to treatment contrary to Article 3 (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161) or would infringe his right to respect for his family life (see *Beldjoudi v. France*, judgment of 26 March 1992, Series A no. 234-A).

However, for an applicant to be able to claim to be a victim in such a situation, he must produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient in this respect (see *Tauira and Others*, cited above, p. 131).

Admittedly, these case-law principles laid down by the Convention institutions concern the domestic legislation of States party to the Convention. However, the Court cannot see any major obstacles to their application to the acts of an international legal order, like the one concerned in the present case.

The Court would point out that the applicants complained in substance that the two relevant common positions infringed rights and freedoms secured to them by the Convention.

It notes that these two common positions are designed to combat terrorism through various measures aimed in particular at blocking the financing of terrorist networks and the harbouring of terrorists. They form part of wider international action undertaken by the United Nations Security Council through its Resolution 1373 (2001), which lays down strategies for combating terrorism, and the financing of terrorism in particular, by every possible means. In that connection, the Court reaffirms the importance of combating terrorism and the legitimate right of democratic societies to

protect themselves against the activities of terrorist organisations (see *Zana v. Turkey*, judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, p. 2548, § 55, and *Mattei v. France* (dec.), no. 40307/98, 15 May 2001).

The Court notes that these two common positions were adopted in the context of implementation of the CFSP by the member States of the European Union and consequently come within the field of intergovernmental cooperation.

With regard, firstly, to Common Position 2001/930/CFSP, the Court observes that this contains measures of principle to be taken by the European Union and its member States to combat terrorism. To that end, Article 14 recommends that member States become parties as soon as possible to the international conventions and protocols relating to terrorism listed in an annex. The Court notes that this common position is not directly applicable in the member States and cannot form the direct basis for any criminal or administrative proceedings against individuals, especially as it does not mention any particular organisation or person. As such, therefore, it does not give rise to legally binding obligations for the applicants.

As regards Common Position 2001/931/CFSP, the Court notes that this is addressed to both the European Community (Articles 2 and 3, relating to the freezing of funds, which affects the free movement of capital, a Community matter) and the member States (Article 4, relating to police and judicial cooperation in criminal matters, which is not a question for the Community). Council Regulation (EC) no. 2580/2001 of 27 December 2001 implemented Articles 2 and 3 as regards their provisions on the freezing of funds. However, the applicants are not concerned by that regulation since, according to the list in the annex to the common position, they are subject only to Article 4. And even if they were affected, they could always apply to the Court of Justice of the European Communities.

Article 4 is aimed precisely at improving police and judicial cooperation between the member States of the European Union in the fight against terrorism. To achieve that aim, it calls on member States to afford each other, through police and judicial cooperation in criminal matters under Title VI of the Treaty on European Union, the widest possible assistance in preventing and combating terrorist acts. To that end, member States may, upon request, fully exploit their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon them. The Court notes that the type of international cooperation advocated in Article 4 is very similar to the cooperation provided for in numerous other international instruments, notably those of the Council of Europe, adopted in the field of judicial cooperation. It acknowledges that Article 4 might be used as the legal basis for concrete measures which could affect the applicants, particularly in the context of police cooperation between States mediated through Community

organs such as Europol. However, Article 4 does not add any new powers which could be exercised against the applicants. It contains only an obligation for member States to afford each other police and judicial cooperation, a form of cooperation which, as such, is not directed at individuals and does not affect them directly.

In any event, concrete measures such as those which have been adopted or might be in the future would be subject to the form of judicial review established in each legal order concerned, whether international or national. That is true more specifically of measures which might give rise to disputes under Articles 10 and 11 of the Convention. The same applies to Community acts such as the above-mentioned Council Regulation (EC) no. 2580/2001 (subject to review by the Court of Justice of the European Communities), other international instruments binding the member States or even any decisions that may have been taken by domestic courts which have referred to the common positions. Moreover, the applicants have not adduced any evidence to show that any particular measures have been taken against them pursuant to Common Position 2001/931/CFSP. The mere fact that the names of two of the applicants (Segi and Gestoras Pro-Amnistía) appear in the list referred to in that provision as "groups or entities involved in terrorist acts" may be embarrassing, but the link is much too tenuous to justify application of the Convention. The reference in question, which is limited to Article 4 of the common position, does not amount to the indictment of the "groups or entities" listed and still less to establishment of their guilt. In the final analysis, the applicant associations are only concerned by the improved cooperation between member States on the basis of their existing powers and they must accordingly be distinguished from the persons presumed to be actually involved in terrorism who are referred to in Articles 2 and 3 of the common position.

With more particular regard to Article 8 of the Convention, pleaded by the applicants who are natural persons, the Court notes that their names do not appear in the list annexed to Common Position 2001/931/CFSP.

Consequently, the Court considers that the situation complained of does not give the applicant associations, and *a fortiori* their spokespersons, the status of victims of a violation of the Convention within the meaning of Article 34 of the Convention.

It follows that the applications must be declared inadmissible, pursuant to Article 34 and Article 35 §§ 1, 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to join the applications;

Declares the applications inadmissible.