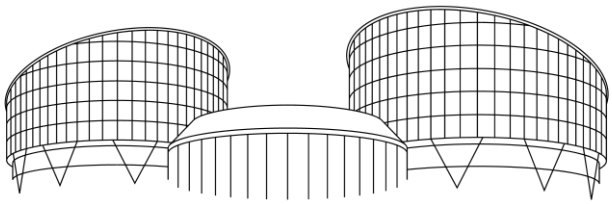

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

# CASE OF HERRMANN v. GERMANY

*(Application no. 9300/07)*

JUDGMENT

STRASBOURG

26 June 2012

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

**In the case of Herrmann v. Germany,**

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

Nicolas Bratza, *President,*
Françoise Tulkens,
Josep Casadevall,
Nina Vajić,
Dean Spielmann,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Khanlar Hajiyev,
Egbert Myjer,
David Thór Björgvinsson,
Nona Tsotsoria,
Nebojša Vučinić,
Angelika Nußberger,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Erik Møse,
André Potocki, *judges,*

and Michael O'Boyle, *Deputy Registrar,*

Having deliberated in private on 30 November 2011 and on 9 May 2012,

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

# PROCEDURE

1. The case originated in an application (no. 9300/07) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Günter Herrmann ("the applicant"), on 12 February 2007.

2. The applicant, who is a lawyer and initially represented himself, was subsequently represented by Mr M. Kleine-Cosack, a lawyer practising in Freiburg. The German Government ("the Government") were represented by their Agent, Ms A. Wittling-Vogel.

3. The applicant alleged that his compulsory membership of a hunting association and the obligation for him to tolerate hunting on his property violated his rights under Article 1 of Protocol No. 1 and Article 9 of the Convention, both taken alone and in conjunction with Article 14 of the Convention, and under Article 11 of the Convention.

4. The application was allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 20 January 2011 a Chamber of that Section composed of the following judges: Peer Lorenzen, President, Renate Jaeger, Rait Maruste, Isabelle Berro-Lefèvre, Mirjana Lazarova Trajkovska, Zdravka Kalaydjieva and Ganna Yudkivska, and Claudia Westerdiek, Section Registrar, declared the application admissible in so far as it concerned the complaints under Article 1 of Protocol No. 1, taken alone and in conjunction with Article 14, and under Article 9 of the Convention, and declared the complaint under Article 11 of the Convention inadmissible. It delivered a judgment in which it held by four votes to three that there had been no violation of Article 1 of Protocol No. 1 taken alone and in conjunction with Article 14 of the Convention. It further held, by six votes to one, that there had been no violation of Article 9 of the Convention. Judges Lorenzen, Berro-Lefèvre and Kalaydjieva expressed a joint dissenting opinion and Judge Kalaydjieva expressed a further separate dissenting opinion. Both opinions were annexed to the judgment.

5. On 20 June 2011, following a request by the applicant dated 13 March 2011, a panel of the Grand Chamber decided to refer the case to the Grand Chamber under Article 43 of the Convention.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. The applicant and the Government each filed further written observations (Rule 59 § 1). In addition, third-party comments were received from the *Bundesarbeitsgemeinschaft der Jagdgenossenschaften und Eigenjagdbesitzer* (BAGJE), the *Deutscher Jagdschutz-Verband e.V.* (DJV) and the European Centre for Law and Justice (ECLJ), all of which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 30 November 2011 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms A. WITTLING-VOGEL, Federal Ministry of Justice, *Agent*,
Ms S. SCHMAHL, Professor of Public Law, *Counsel*,
Ms S. WINKELMAIER, Federal Ministry of Justice,
Ms D. FRIEDRICH, Federal Ministry of Agriculture,
Mr A. HEIDER, Federal Ministry of Agriculture, *Advisers*;

(b) *for the applicant*
Mr M. KLEINE-COSACK, lawyer, *Counsel*,
Mr D. STORR, lawyer,
Ms H. SEPPAIN, *Advisers*.

9. The applicant was also present. The Grand Chamber heard addresses by Mr Kleine-Cosack and Ms Schmahl as well as their answers to questions put by the judges. Additional information was submitted by the Government and the applicant in writing.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1955 and lives in Stutensee.

### A. The applicant's land

11. Under the German Federal Hunting Act (*Bundesjagdgesetz*), owners of hunting grounds with a surface area of less than 75 hectares are *de jure* members of a hunting association (*Jagdgenossenschaft*), while owners of larger plots of land manage their own hunting district. The applicant owns two landholdings in Rhineland-Palatinate of less than 75 hectares each, which he inherited in 1993 from his late mother. He is thus a *de jure* member of a hunting association, in this case the hunting association of the municipality of Langsur.

### B. The applicant's claims before the administrative authorities and courts

12. On 14 February 2003 the applicant, who is opposed to hunting on ethical grounds, filed a request with the hunting authority seeking to terminate his membership of the hunting association. The authority rejected his request on the grounds that his membership was prescribed by law and that there was no provision for the termination of membership.

13. The applicant brought proceedings before the Trier Administrative Court. Relying in particular on the Court's judgment in the case of *Chassagnou and Others v. France* ([GC], nos. 25088/94, 28331/95 and 28443/95, ECHR 1999-III), he requested the Administrative Court to find it established that he was not a member of the hunting association of the municipality of Langsur.

14. On 14 January 2004 the Administrative Court rejected the applicant's request. It considered that the Federal Hunting Act did not violate the applicant's rights. With regard to the *Chassagnou* judgment, the Administrative Court took the view that the situation in Germany differed from that in France. It observed, in particular, that German owners of hunting grounds were able, by virtue of their membership of the hunting

association, to influence the decision-making process as to how the relevant hunting rights should be exercised. Furthermore, they had the right to receive a share of the profits derived from the exercise of those hunting rights. All owners of plots which were too small to allow proper management of hunting rights joined a hunting association. The court further considered that the hunting associations not only served the leisure interests of those who exercised the hunting rights, but also imposed certain specific obligations on them which served the general interest, in particular a duty to manage game stocks with the aim of maintaining varied and healthy game populations and a duty to prevent damage caused by wild game. They were further obliged to comply with specific quotas set by the authorities for the hunting of game. These duties applied in the same way to the owners of hunting grounds of more than 75 hectares, notwithstanding the fact that these bigger plots were not grouped together in common hunting districts.

15. On 13 July 2004 and 14 April 2005 the Rhineland-Palatinate Administrative Court of Appeal and the Federal Administrative Court dismissed the appeals lodged by the applicant, on the same grounds as the Administrative Court.

### C. The decision of the Federal Constitutional Court

16. On 13 December 2006 the Federal Constitutional Court (1 BvR 2084/05) refused to admit a constitutional complaint by the applicant for adjudication. It noted at the outset that the provisions of the Federal Hunting Act did not violate the applicant's right to the peaceful enjoyment of his property, but defined and limited the exercise of that right in a proportionate manner. The relevant provisions pursued legitimate aims, were necessary and did not impose an excessive burden on landowners.

17. When defining the content and limits of property rights, the legislature had to weigh the landowners' legitimate interests against the general interest. It had, in particular, to respect the principles of proportionality and equal treatment. The limitations imposed on the exercise of property rights must not infringe the core area of the protected right. The margin of appreciation allowed to the legislature depended on the specific context; the more important the social considerations, the wider the margin of appreciation.

18. Applying these principles to the instant case, the Federal Constitutional Court considered that the applicant's compulsory membership of a hunting association did not violate his property rights. The core area of that right had not been infringed. The Federal Hunting Act pursued the legitimate aims of preserving game in a manner adapted to the rural and cultural environment and ensuring healthy and varied wildlife, aims encompassed in the notion of "management and protection of game

stocks" (*Hege*). Under the Federal Hunting Act, gamekeeping was a means not only of preventing damage caused by wildlife, but also of avoiding any impediment to the use of the land for agriculture, forestry and fishing. These aims served the general interest.

19. Compulsory membership of a hunting association was an appropriate and necessary means of achieving those aims. Referring to paragraph 79 of the *Chassagnou* judgment, cited above, the Constitutional Court considered that the European Court of Human Rights had acknowledged that it was undoubtedly in the general interest to avoid unregulated hunting and encourage the rational management of game stocks. Compulsory membership of a hunting association was also a proportionate means. The impact on property rights was not particularly serious and did not outweigh the general interest in the rational management of game stocks. Furthermore, the Federal Hunting Act conferred on every member of the hunting association the right to participate in the decision-making process within the association and to receive a share of the profits derived from the leasing of the hunting rights.

20. The Constitutional Court further considered that there had been no violation of the applicant's right to freedom of conscience. It noted that in paragraph 114 of the *Chassagnou* judgment the European Court of Human Rights had accepted that the convictions of the applicants in that case attained a certain level of cogency, cohesion and importance and were therefore worthy of respect in a democratic society. The Constitutional Court left open the question whether this assessment was correct in Mr Herrmann's case. It agreed, however, to take this assumption as a starting point as it considered that in any case there had been no violation of Article 4 of the Basic Law (see paragraph 25 below). It was doubtful whether there had been any interference with the applicant's right to freedom of conscience. Even assuming that there had been, it was, in any event, not of a serious nature. As the applicant was not forced to participate in hunting himself and did not have to take any decision in that respect, the court considered that he had not been placed in a position of conflict of conscience. It further observed that the right to freedom of conscience did not encompass a right to have the entire legal order made subject to one's own ethical standards. If the legal order distributed the right to make use of a certain property among several stakeholders, the owner's conscience did not necessarily outweigh the other stakeholders' constitutional rights. If the applicant's landholding – and those of other owners who were opposed to hunting – were taken out of the common hunting districts because of the landowners' convictions, the whole system of property ownership and management of game stocks would be jeopardised. The right to freedom of conscience did not outweigh the general interest in the instant case.

21. According to the Federal Constitutional Court, the applicant's complaint did not come within the scope of the right to freedom of

association because German hunting associations were of a public nature. They were vested with administrative, rule-making and disciplinary prerogatives and remained integrated within State structures. There was thus no doubt that the association was not characterised as "public" simply in order to remove it from the scope of Article 11 of the Convention.

22. The Federal Constitutional Court further considered that the applicant's right to equal treatment had not been breached. The administrative courts had put forward relevant reasons for drawing a distinction between the owners of landholdings of less than 75 hectares and those of more than 75 hectares (see paragraph 11 above). Contrary to the situation in France, which had been examined by the Court in the *Chassagnou* judgment, the Federal Hunting Act applied to the whole of Germany and was binding on all landowners. The owners of land of more than 75 hectares had the same duties with regard to gamekeeping as those who belonged to hunting associations.

23. Finally, the Federal Constitutional Court observed that the administrative courts had considered the *Chassagnou* judgment and had emphasised the differences between German and French law as applicable at the relevant time.

### D. The use of the applicant's land

24. Having been invited by the President of the Grand Chamber to provide the Court with additional information regarding the actual use of the applicant's land, the Government submitted a declaration by the farmer who had taken out a lease on the agricultural land to which the applicant's plots belonged. The farmer submitted that she regularly used the land to raise cattle destined for slaughter. This was confirmed in a written statement by the mayor of the municipality of Langsur. The applicant submitted that he had visited the plots several times over the previous years without ever seeing any cattle. He had never given permission for his land to be used in that way and would take legal action against any possible abuse.

## II. RELEVANT DOMESTIC LAW

### A. The Basic Law

25. The Basic Law provides:

**Article 4**
**[Freedom of faith and conscience]**

"(1) Freedom of faith and conscience and freedom to profess a religious or philosophical creed shall be inviolable."

**Article 14**
**[Property – Inheritance – Expropriation]**

"(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the law.

(2) Property entails obligations. Its use shall also serve the public good."

**Article 20a**
**(as in force since 1 August 2002)**
**[Protection of the natural foundations of life and animals]**

"Mindful also of its responsibility toward future generations, the State shall protect the natural foundations of life and animals through legislation and, in accordance with law and justice, through executive and judicial measures, all within the framework of the constitutional order."

**Article 72**
**(as in force since 1 September 2006)**
**[Concurrent legislative powers]**

"(1) On matters falling within the scope of concurrent legislative powers, the *Länder* shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative powers by enacting a law.

(2) ...

(3) If the Federation has made use of its power to legislate, the *Länder* may enact laws at variance with this legislation with respect to:

1. hunting (except for the law on hunting licenses);

...

Federal laws on these matters shall enter into force no earlier than six months following their promulgation unless otherwise provided with the consent of the *Bundesrat*. As regards the relationship between Federal law and the laws of the *Länder*, the more recent law shall take precedence in respect of matters coming within the scope of the first sentence."

## B. The Civil Code

26. Section 960(1)(1) of the Civil Code provides:

"Wild animals shall be ownerless as long as they are not in captivity. ..."

## C. The Federal Hunting Act

27. Section 1 of the Federal Hunting Act *(Bundesjagdgesetz)* reads as follows:

"(1) Hunting rights shall comprise the exclusive rights to protect, hunt and acquire ownership of wild game in a specific area. Hunting rights shall be linked to a duty to manage and protect game stocks (*Pflicht zur Hege*).

(2) The management of game stocks shall be aimed at maintaining varied and healthy game populations at a level compatible with care of the land and with the prevailing cultural conditions and at preventing damage caused by game ...

(3) Persons engaging in hunting shall abide by the commonly accepted standards of the German ethical principles governing hunting (*deutsche Weidgerechtigkeit*).

(4) Hunting shall encompass the search for, pursuit, killing and catching of wild game.

..."

28. The Federal Hunting Act distinguishes between hunting rights (*Jagdrecht*) and the exercise of hunting rights (*Ausübung des Jagdrechts*). The landowner has hunting rights over his or her property. The exercise of hunting rights is regulated by the following sections of the Hunting Act:

**Section 4**

"Hunting rights may be exercised either in private hunting districts (section 7) or in common hunting districts (section 8)."

**Section 6**
**(Enclosed properties, suspension of the hunt)**

"The hunt shall be suspended on land which does not belong to a hunting district, and on enclosed properties (*befriedete Bezirke*). Limited exercise of hunting rights may be permitted. This law does not apply to zoological gardens."

29. Section 7 provides, *inter alia*, that plots of at least 75 hectares which can be used for agriculture, forestry or fishing and which belong to a single owner constitute private hunting districts.

30. Section 8 provides that all land which does not belong to a private hunting district constitutes a common hunting district if it has an overall surface area of at least 150 hectares. The owners of land belonging to a common hunting district are *de jure* members of a hunting association according to the following provisions:

**Section 9(1)**

"The owners of land belonging to a common hunting district shall form a hunting association. The owners of land on which hunting is prohibited shall not belong to the hunting association."

**Section 10**

"(1) The hunting association shall as a rule operate the hunt on a leasehold basis. The lease may be limited to the members of the association.

(2) The hunting association shall be allowed to lease out the hunting rights on its own account. With the agreement of the competent authority, it may decide to suspend the hunt (*Ruhen der Jagd*).

(3) The association shall decide on the use to be made of the net profits from the hunt. If the association decides not to distribute them among the owners of the hunting

grounds according to the amount of land they own, each owner who contests this decision shall be allowed to claim his or her share. ...”

31. The practice of hunting is regulated as follows:

**Section 20**

“(1) Hunting shall be prohibited in areas where it would, in the specific circumstances, disturb public peace, order or safety or endanger human life.

(2) Hunting in nature and wildlife conservation areas and in national and wildlife parks shall be regulated by the *Länder*.”

**Section 21(1)**

“The shooting of game is to be regulated in a manner which fully safeguards the legitimate interest of agriculture, fishery and forestry in being protected from damage caused by wild game, and which takes into account the requirements of the conservation of nature and the landscape. Subject to these restrictions, the regulation of game shooting shall contribute to maintaining a healthy population of all domestic game in adequate numbers and, in particular, to ensuring the protection of endangered species.”

32. Liability for damage caused by game is regulated as follows:

**Section 29(1)**

“If a plot belonging to a common hunting district or being incorporated in a common hunting district is damaged by cloven-hoofed game, wild rabbits or pheasants, the hunting association shall compensate the landowner for the damage. The cost of compensation shall be borne by the members of the association in proportion to the size of their respective plots. If the leaseholder of the hunt has assumed partial or full liability for compensation in respect of game damage, he or she shall be liable. The hunting association shall remain liable if the person who sustained the damage is unable to obtain compensation from the leaseholder.”

## D. The Hunting Act of Rhineland-Palatinate

33. In so far as relevant, the Hunting Act of Rhineland-Palatinate – the *Land* where the applicant’s plots are located – provides as follows:

**Section 7**

“(1) Hunting association are public-law corporations. They are subject to State supervision, exercised by the local hunting authority ... Each hunting association shall create its own statutes (*Satzung*). The statutes must be approved by the supervisory authority unless they are in accordance with the model statutes issued by the highest hunting authority; in this case, notice of the statutes shall be given to the local hunting authority. If the hunting association fails to create statutes within one year after the issue of the model statutes, the supervisory authority shall create and publish them ... at the association’s expense.

...

(4) Cost orders (*Umlageforderungen*) shall be enforced in accordance with the provisions of the law on the enforcement of administrative acts. The powers of enforcement shall be exercised by the treasury office responsible for enforcing the claims of the municipality in which the association is situated ...”

## III. COMPARATIVE LAW

34. The research undertaken by the Court in relation to forty Council of Europe member States shows that membership of a hunting association is not compulsory in thirty-four countries (Albania, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Montenegro, the Netherlands, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, “the former Yugoslav Republic of Macedonia”, Turkey, Ukraine and the United Kingdom). In Austria, France and Sweden membership of a hunting association is obligatory in principle. The legislation in Georgia and in Switzerland makes no provision for hunting associations. Lastly, hunting is not practised in Monaco.

35. Considerable differences exist between these member States’ laws as regards the obligation for landowners to tolerate hunting on their land. Of the thirty-nine member States in which hunting is practised, eighteen (Albania, Azerbaijan, Belgium, Estonia, Finland, Georgia, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Portugal, “the former Yugoslav Republic of Macedonia”, the United Kingdom and Ukraine) do not oblige landowners to tolerate hunting, while eighteen others (Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Greece, Italy, Montenegro, Poland, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden and Turkey) do. However, both groups provide for exceptions of varying degrees to their respective rules. In France and the Czech Republic, the obligation to tolerate hunting depends on the specific situation regarding the plot of land and on administrative decisions. In Switzerland, there is no legislation governing the obligation to tolerate hunting.

36. In four member States the legislation or case-law has been amended following the Court’s judgment in the case of *Chassagnou and Others*, cited above. In France, under the *Loi Voynet* of 26 July 2000, owners of land who are opposed to hunting for ethical reasons may, under certain conditions, request the termination of their membership of a hunting association. In Lithuania, following a ruling by the Constitutional Court, section 13(2) of the Hunting Act ceased to apply on 19 May 2005. Under this provision, landowners could object to hunting on their land only in cases where it might cause damage to their crops or forest land. In Luxembourg, in the wake of the judgments in *Schneider v. Luxembourg* (no. 2113/04, 10 July 2007) and *Chassagnou and Others*, cited above, the Hunting Act of 20 July

1929 was repealed and a new Act entered into force on 31 May 2011. It provides that landowners opposed to hunting on their land may, under certain conditions, request termination of their membership of a hunting association. Lastly, in the Czech Republic, the Constitutional Court ruled on 13 December 2006 that the administrative authority had to decide whether land could be included in a hunting district by weighing the different interests at stake in the light of the principles set out in the *Chassagnou* judgment.

# THE LAW

## I. THE SCOPE OF THE CASE BEFORE THE GRAND CHAMBER

37. In his submissions before the Grand Chamber, the applicant reiterated his complaint under Article 11 taken separately and in conjunction with Article 14 of the Convention. In the alternative, he complained under Article 8 of the Convention about his compulsory membership of the hunting association.

38. The Court reiterates that the "case" referred to the Grand Chamber is the application as it has been declared admissible by the Chamber (compare, among many other authorities, *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-141, ECHR 2001-VII; *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 109, ECHR-2007-IV; and *Taxquet v. Belgium* [GC], no. 926/05, § 61, ECHR 2010). This means that the Grand Chamber may examine the case in its entirety in so far as it has been declared admissible; it cannot, however, examine those parts of the application which have been declared inadmissible by the Chamber (see *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, §§ 59-62 ECHR 2007-I, and *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 235, 26 June 2012).

39. It follows that in the context of the present case, the Court no longer has jurisdiction to examine the complaints under Article 11, taken alone and in conjunction with Article 14 of the Convention, which were declared inadmissible by the Chamber (see paragraph 4 above). The same applies to the complaint under Article 8 of the Convention, a provision which was not relied upon by the applicant before the Chamber.

## II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

40. The applicant complained that the obligation to tolerate the exercise of hunting rights on his property violated his right to the peaceful enjoyment of his possessions as guaranteed by Article 1 of Protocol No. 1 to the Convention, which reads as follows:

"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 Chamber judgment

41. The Chamber found that the obligation to allow hunting on his property interfered with the applicant's right to the peaceful enjoyment of his property but was justified under the second paragraph of Article 1 of Protocol No. 1 to the Convention. The Chamber noted at the outset that the Federal Hunting Act was aimed at maintaining varied and healthy game populations at a level compatible with care of the land and with cultural conditions, and at avoiding game damage. The Chamber accepted that these aims were in the general interest.

42. With regard to the proportionality of the interference, the Chamber took note of the emphasis the relevant law placed on the maintenance of healthy fauna in accordance with ecological and economic conditions. Even though it appeared that hunting was primarily practised by individuals during their spare time, the Chamber considered that the purpose of the Hunting Act could not be reduced to merely enabling certain individuals to exercise a leisure activity.

43. With regard to the necessity of the measure at issue, the Chamber further considered that the German law, in contrast to the legislation examined in the cases of *Chassagnou* and *Schneider*, cited above, applied nationwide and did not exempt the public or private owners of any property that was *a priori* suitable for hunting from the obligation to tolerate hunting on their property. Lastly, it considered that any exceptions to the rule of area-wide hunting were sufficiently justified by general and hunting-related interests and thus did not call into question the principle of area-wide hunting as such.

44. The Chamber further noted that the applicant was entitled to a share of the profits from the lease in proportion to the size of his property. Even though the sum he could claim did not appear to be substantial, the Chamber considered that the relevant provisions prevented other individuals from deriving financial profit from the use of the applicant's land.

45. Having regard to the wide margin of appreciation afforded to the Contracting States in this area, allowing them to take into account the specific circumstances prevailing in their country, the Chamber concluded that there had been no violation of Article 1 of Protocol No. 1 (see paragraphs 45-56 of the Chamber judgment).

## B. The parties' submissions

### *1. The applicant*

46. The applicant submitted that the limitations imposed on the use of his land by the Federal Hunting Act were disproportionate. The German legislature had failed to strike a fair balance between his interest in enjoying the use of his property and the alleged general interest in the practice of hunting. As he was the only landowner within the hunting association who was opposed to the practice of hunting, he was materially unable to prevent the leasing of the hunting rights.

47. The circumstances of the case resembled those examined by the Court in the cases of *Chassagnou* and *Schneider*, cited above, and thus should lead to the same conclusions. The aims pursued by the German legislature were largely similar to those that had been pursued in France and Luxembourg.

48. The concept of "*Hege"* (the management and protection of game stocks) dated back to the Third Reich and did not serve the protection of game. Recent scientific research had demonstrated that wild game was able to self-regulate and that excessive hunting even increased the numbers of certain species. Road accidents involving wild game were in the majority of cases caused by hunting. Furthermore, hunting did not in any way respect the need to protect rare and endangered species.

49. In Germany, the hunt was in practice exercised as a leisure activity. Many species such as birds of prey were hunted without any ecological or economical necessity. Hunting could not be regarded as having a positive impact on issues of general interest. The ethical protection of animals was guaranteed by Article 20a of the Basic Law (see paragraph 25 above), while the right to hunt was not protected either by the Basic Law or by the Convention.

50. The statutory measures laid down by the hunting legislation were by no means necessary for the control of property in accordance with the general interest. This was demonstrated by the fact that the Federal Hunting Act contained numerous exemptions from the obligation to tolerate hunting, in particular regarding areas which did not belong to a hunting district (for example, enclaves within a private hunting district). Furthermore, the hunting authority could authorise suspension of the hunt. The *Länder* were entitled to create areas which were not subject to hunting rights and had done so, in particular by creating vast nature reserves in which hunting was prohibited or only permitted under very exceptional circumstances.

51. As the total number of hunters amounted to 358,000 and these hunted only occasionally in their spare time, it was materially impossible to subject the whole of German territory to the hunt. Furthermore, since the reform of the Federal system in Germany in 2006, the *Länder* were free to

regulate hunting on their own initiative or even to abolish hunting altogether.

52. The applicant contested the Government's argument that the situation in Germany differed from that encountered in France, Luxembourg or other member States. In Germany, the average population density per square kilometre was 230 inhabitants; in many *Länder*, it was far below this figure. The population density in the *Land* of Rhineland-Palatinate, in which the applicant's plots were situated, was 203 inhabitants per square kilometre and was thus very close to the population density in Luxembourg (189 inhabitants per square kilometre). The applicant's land was only two kilometres from the Luxembourg border. Numerous States Parties to the Convention did not have hunting associations and yet did not encounter problems deriving from excessive numbers of wild animals.

53. The measure was also disproportionate. The applicant had no effective means available to him by which to prevent hunting on his land. Furthermore, he had not received any financial compensation for the obligation to tolerate hunting on his property. In view of his ethical convictions, the psychological stress he suffered as a result of the hunt could not be made good by financial compensation, which in any event would only be minor. The applicant further relied on the Court's argument concerning the irreconcilability of financial compensation with the ethical motives invoked by him (the applicant referred to *Schneider*, cited above, § 49).

*2. The Government*

54. The Government conceded that the obligation to tolerate hunting, which ran counter to the applicant's convictions, had interfered with his rights under Article 1 of Protocol No. 1. Nevertheless, they pointed out that in Germany – in contrast to the situation in France and Luxembourg, where hunting rights were transferred completely to the hunting associations – the landowner remained the holder of the hunting rights and was thus not deprived of any possessions. He merely had to cede the right to practise hunting. Privately owned land, which was limited in quantity, had a particular social relevance which entitled the legislature to limit its use in the general interest.

55. Unlike the French *Loi Verdeille*, the German Federal Hunting Act did not pursue the goal of furthering the leisure activities of individual hunters or even of giving individuals the possibility of participating in hunting as a group, but pursued exclusively aims in the public interest. The German hunting legislation differed substantially from the French and Luxembourg laws. This was evident in the notion of "*Hege*", which transcended the simple management of orderly hunting and encompassed general protection of game stocks. Hunting rights entailed an obligation to preserve varied and healthy game stocks while at the same time regulating

the numbers of game in order to prevent game damage in agricultural and forest areas. Regulation of the quantity of wild game was particularly important in a densely populated country like Germany, for example in order to avoid the spread of animal diseases or damage caused by wild game on other property.

56. The system of hunting associations in Germany covered all areas, including State-owned property, and was internally consistent. In contrast to the situation in France, in Germany the principle of area-wide hunting applied across the entire Federal territory. It was essential that hunting be carried out in all suitable areas, as game did not stop at district borders and would retreat into areas which were exempt from hunting. Exempting individual areas from the hunting system would lead to hunting districts being fragmented into numerous smaller areas; this ran counter to the principle of uniform maintenance and protection of game stocks.

57. In contrast to the situation under Luxembourg law, a duty to practise hunting also existed on larger plots of land. Even though the owners of plots of more than 75 hectares were not *de jure* members of a hunting association, they were obliged to regulate game stocks and thus to practise hunting in the same way as the owners of plots belonging to a common hunting district.

58. There were only a few exceptions to this rule, all of which were based on overriding general interests. It was true that the hunt was suspended in those areas which did not belong to a hunting district. However, only a few areas fell within the scope of that provision and they were generally incorporated into other hunting districts. The hunting authority only granted a suspension of the hunt in exceptional cases and for reasons relating to the management and protection of game stocks. Even in nature reserves hunting was not generally excluded; the regulation of the hunt depended on specific conservation aims. The reform of the Federal system had not changed this situation, as all the *Länder* had opted to maintain the system of area-wide hunting.

59. The fact that other countries did not have hunting associations did not mean that landowners in those countries did not have to tolerate hunting on their properties, as other States also needed to find ways of fulfilling their international treaty obligations to protect species and animals. The natural system of self-regulation of wild game had ceased to function in the densely populated and heavily exploited regions of Central Europe.

60. The regulations set out in German law were necessary as there was no less intrusive means that would have been equally suited to achieving the legislature’s aims. A system based on voluntary participation could not ensure a solution covering the whole area. Furthermore, compulsory membership ensured that none of the persons concerned were excluded from the system. A State-run administrative hunt was likewise not an efficient system, since without the self-administering hunting associations

the State would have to undertake considerably more – and more expensive – regulation and monitoring in order to achieve the objectives of hunting.

61. Even though the applicant had no realistic means of preventing hunting on his land, this did not impose a disproportionate burden on him. The obligation to tolerate hunting was only of relevance during the hunting season. In addition, German law provided for a number of different forms of compensation which entirely made up for the interference with the applicant's property rights.

62. Firstly, unlike in France, the landowners were entitled to a share of the profits derived from the leasing of the hunting rights. However, the applicant had never claimed his share from the hunting association. The Government did not subscribe to the view expressed by the Court in the *Schneider* judgment that ethical convictions could not be balanced against financial compensation (see *Schneider*, cited above, § 49). Article 1 of Protocol No. 1 protected the enjoyment of property without being subjected to external limitations. It did not, however, in any sense protect ethical convictions, still less authorise property owners to use their rights to political ends as envisaged by the applicant.

63. Secondly, the applicant had the possibility of participating in the decision-making process within the hunting association with the aim of convincing the majority of members of his personal point of view and having this incorporated within the framework of the applicable law.

64. Furthermore, the interests of landowners were safeguarded to the greatest extent possible by the Federal Hunting Act, which imposed on persons participating in the hunt the duty to respect the legitimate interests of landowners and made them liable for any damage caused by the hunt.

65. The limitations imposed on hunting took into account ethical considerations, for example by prohibiting the use of certain kinds of ammunition. The applicant remained free to take measures to protect wildlife on his property. Furthermore, it was appropriate to impose on persons engaging in hunting the duty to catch, take care of and, if necessary, kill seriously injured game because only hunters had the necessary training allowing them to assess the situation and to take the necessary measures.

*3. The third-party interveners*

**(a) German association for the protection of hunting (*Deutscher Jagdschutz-Verband e. V.*, DJV)**

66. The DJV – a private association representing the interests of hunters in Germany – emphasised the significance of the outcome of the instant proceedings both for the entire hunting system and for hunters' interests. In order to be allowed to hunt, hunters had to prove extensive knowledge in the relevant spheres and had to adhere to the highest ethical standards regarding the protection of animals and nature conservation. The specific

situation in Germany, in particular its dense population and the intensive cultivation of its land, made it extremely difficult to regulate game populations.

67. The principle of area-wide hunting was implemented consistently in Germany. Areas excluded from hunting districts under section 6(1) of the Federal Hunting Act comprised less than 0.01 % of all land. Exclusion was only temporary and the hunting authorities were required to incorporate such areas rapidly into neighbouring hunting districts. There was currently no known case in which an application to suspend the hunt temporarily had been approved by the higher hunting authority of the *Land* of Rhineland-Palatinate, where the applicant's property was situated.

68. If certain areas were excluded from the hunt, there would inevitably be considerable concentrations of wild animals on those properties where hunting was not permitted. Fleeing and injured animals could not be followed into these areas, and it would become virtually impossible to practise hunting effectively and provide relief to suffering animals. Summing up, the DJV considered that it would no longer be possible to ensure the proper regulation of game populations, resulting in severe disruption to the ecological balance. Furthermore, hunters would no longer be prepared to assume liability for damage caused by wild game.

**(b) Federation of hunting associations and owners of private hunting districts (*Bundesarbeitsgemeinschaft der Jagdgenossenschaften und Eigenjagdbesitzer*, BAGJE)**

69. The BAGJE – a federation of all State/regional associations and State-sponsored committees of property owners possessing hunting rights – emphasised the significance of the Court's ruling in the instant case for the thousands of landowners they represented. In Germany, the system of hunting associations was a successful model of self-government and conflict prevention by landowners.

70. The question whether or not hunting was allowed had never been part of the definition of property. The legislature, by regulating the exercise of hunting, did not interfere with landowners' property rights, but merely defined the meaning of property.

71. The BAGJE further pointed out that a hunting association was not made up of hunters, but comprised all property owners of smaller plots of land. It was not up to the hunting association to decide whether to exercise the hunt on their property. The advantages conferred by membership in a hunting association could not be reduced to the *pro rata* compensation provided, but also comprised compensation paid to landowners for any damage caused by wild game on their property. This could amount to several thousand euros per year even for the owner of a small plot of land.

## C. The Grand Chamber's assessment

### *1. Interference with the applicant's rights under Article 1 of Protocol No. 1 to the Convention*

72. The Grand Chamber observes that the Government did not contest the applicant's assertion that the obligation to allow hunting on his property interfered with his right to the peaceful enjoyment of his property (see paragraph 54 above). The Grand Chamber endorses this assessment and reiterates that the obligation for individuals to tolerate the presence of armed men and hunting dogs on their land constitutes a restriction on the free exercise of their right to use their property (see *Chassagnou and Others*, cited above, § 74, and *Schneider*, cited above, § 44).

### *2. Compliance with the conditions laid down in the second paragraph*

73. The interference in question is to be analysed in the light of the second paragraph of Article 1 of Protocol No. 1. The Grand Chamber considers that the impugned hunting legislation can be said to constitute a means of controlling the use of property in accordance with the general interest (compare *Schneider*, cited above, § 41).

#### (a) General principles

74. It is well-established case-law that the second paragraph of Article 1 of Protocol No. 1 must be construed in the light of the principle laid down in the first sentence of the Article (see, among other authorities, *James and Others v. the United Kingdom*, 21 February 1986, § 37, Series A no. 98; *Broniowski v. Poland* [GC], no. 31443/96, § 134, ECHR 2004-V; and *Brosset-Triboulet and Others v. France* [GC], no. 34078/02, § 80, 29 March 2010). Consequently, a law interfering with the right to the peaceful enjoyment of possessions must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is reflected in the structure of Article 1 as a whole, and therefore also in the second paragraph thereof: there must be a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question (see *Chassagnou and Others*, cited above, § 75; *Schneider*, cited above, § 45; and *Depalle v. France* [GC], no. 34044/02, § 83, ECHR 2010).

**(b) Conclusions drawn by the Court in the cases of *Chassagnou* and *Schneider***

75. The Court examined for the first time in *Chassagnou*, cited above, whether the obligation to tolerate hunting on one's land was compatible with the principles enshrined in Article 1 of Protocol No. 1.

76. In that case the Grand Chamber held that the French *Loi Verdeille* of 1964 pursued in particular the legitimate aims of avoiding unregulated hunting and encouraging the rational management of game stocks. According to that law, the applicants could not avoid the compulsory transfer of hunting rights and no measure of compensation was contemplated for landowners who, like the applicants, were opposed to hunting and did not wish to derive any advantage or profit from the right to hunt. The Court also noted that this was an exception to two principles: that ownership means the right to enjoy and dispose of things in the most absolute manner, and that no one may hunt on land belonging to another without the owner's consent. Moreover, automatic membership of municipal hunters' associations applied only in 29 of the 93 French *départements* concerned, such associations had been set up in only 851 municipalities and the *Loi Verdeille* applied only to landholdings less than 20 hectares in area. The above considerations led the Court to the conclusion that the impugned compulsory-transfer system had placed the applicants in a situation which upset the fair balance to be struck between protection of the right of property and the requirements of the general interest. Compelling small landowners to transfer hunting rights over their land so that others could make use of them in a way which was totally incompatible with their beliefs imposed a disproportionate burden which was not justified under the second paragraph of Article 1 of Protocol No. 1 (see *Chassagnou and Others*, cited above, §§ 79 and 82-85).

77. These findings were subsequently confirmed by a Chamber of the Court in the case of *Schneider*, cited above, which was lodged by the owner of a small landholding located in Luxembourg. The Chamber noted that, unlike the *Loi Verdeille*, the law in Luxembourg provided for financial compensation to be paid to the landowner; the Chamber did not, however, consider this fact to be decisive, as the ethical convictions of an opponent of hunting could not be reasonably balanced against an annual fee for the loss of the use of the property. In any event, the amount proposed (EUR 3.25 per year) could not be seen as fair compensation for the applicant (see *Schneider*, cited above, § 49).

**(c) Consistency of case-law**

78. The Court reiterates that, while it is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. However, since the Convention is first and foremost a system for the protection of human

rights, the Court must have regard to the changing conditions in Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved (see, among many other authorities, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I, and *Bayatyan v. Armenia* [GC], no. 23459/03, § 98, ECHR 2011, and the case-law cited in those judgments).

79. The Court notes that, since the adoption of the Court's judgments in the cases of *Chassagnou* and *Schneider* (both cited above), various Contracting States have amended their respective legislation or modified their case-law in order to comply with the principles set out in these judgments (see paragraph 36 above).

80. That being so, the Court cannot but reaffirm the principles set out in the *Chassagnou* and *Schneider* judgments, notably that imposing on a landowner opposed to the hunt on ethical grounds the obligation to tolerate hunting on his or her property is liable to upset the fair balance between protection of the right of property and the requirements of the general interest and to impose on the person concerned a disproportionate burden incompatible with Article 1 of Protocol No. 1.

**(d) Application of these principles to the instant case**

81. It remains to be ascertained whether, as argued by the Government, the provisions of the German Federal Hunting Act, as applied in the instant case, differ in a relevant way from the factual and legal situation in France and Luxembourg described in the cases of *Chassagnou* and *Schneider*, cited above, and, if so, whether the differences in question are substantial enough to justify the conclusion that Article 1 of Protocol No. 1 has not been breached in the particular circumstances of the present case.

82. In doing so, the Court will examine in turn the aims of the legislation in issue, its territorial application, the possible exceptions to compulsory membership and the issue of compensation.

*(i) General aims*

83. The Court observes, at the outset, that the aims of the German hunting legislation are laid down in section 1(1) and (2) of the Federal Hunting Act (see paragraph 27 above). These include the management of game stocks, which, in turn, is aimed at maintaining varied and healthy game populations at a level compatible with care of the land and with the prevailing cultural conditions and at preventing damage caused by game. The Court further takes note of the Government's submissions to the effect that hunting is aimed also at preventing the spread of animal diseases. Similarly, one of the main objectives of the French *Loi Verdeille* was to facilitate "rational organisation of hunting, consistent with respect for the environment" (see *Chassagnou and Others*, cited above, § 78). Comparable objectives were pursued by the Luxembourg law, which was aimed at

"rational management of game stocks and preservation of the ecological balance" (see *Schneider*, cited above, § 34).

84. The Court further observes that the Federal Hunting Act, in contrast to the French *Loi Verdeille*, does not appear to be primarily aimed at serving hunters' interests (compare *Chassagnou and Others*, cited above, § 106), but requires private hunters to contribute to the achievement of objectives in the public interest (see paragraph 55 above). Notwithstanding this, the German hunting legislation confers certain rights on persons who hunt, such as the right to pursue and to acquire ownership of the game (see section 1(1) of the Federal Hunting Act, quoted in paragraph 27 above). In the Court's view, the fact that the Hunting Act entails obligations does not, in any event, alter the fact that hunting is primarily carried out in Germany by private individuals as a leisure activity, just as used to be the case in France and Luxembourg.

85. Having regard to the above, the Court concludes that the aims pursued by the German legislation do not differ significantly from those pursued by the French and Luxembourg laws previously examined by the Court.

*(ii) Territorial scope and exemptions from membership of hunting associations*

86. The Grand Chamber further notes that the Chamber and the Government attached particular weight to the argument that the German hunting legislation applied nationwide (see paragraphs 43 and 56 above). The Court notes that the French *Loi Verdeille* applied to 29 out of 93 *départements* concerned, with the possibility of its application being extended to the whole of French territory (see *Chassagnou and Others*, cited above, §§ 78 and 84). In Luxembourg and Germany the legislation applied – in principle – nationwide. However, following a reform of the German Federal system which entered into force in 2006, the German *Länder* now have the possibility to regulate hunting by departing from the Federal Hunting Act (see Article 72 of the Basic Law, quoted in paragraph 25 above), although they have hitherto opted to maintain the system of area-wide hunting (see paragraph 58 above).

87. All three laws provide or provided for territorial exceptions for enclosed areas. Under section 6 of the Federal Hunting Act, hunting is suspended on land which does not belong to a hunting district (enclaves, see paragraph 28 above), notwithstanding the possibility of incorporating this land into an existing hunting district (see paragraphs 58 and 67 above). In France and Germany, further exceptions were/are made for nature reserves and game reserves (see *Chassagnou and Others*, cited above, § 58, and paragraph 31 above), and in Luxembourg, houses and gardens were exempted (see *Schneider*, cited above, § 19). In France and Luxembourg, roads and railways were also excluded from the hunting districts (see

*Chassagnou and Others*, cited above, § 46, and *Schneider*, cited above, § 19).

88. As to personal exemptions, the French laws excluded State property, and owners of larger plots were not required to be members of a hunting association (see *Chassagnou and Others*, cited above, § 116). It appears, furthermore, that the owners of larger plots were not obliged to hunt or to tolerate hunting on their property (see *Chassagnou and Others*, cited above, § 92). The Luxembourg law excluded all private property owned by the Crown (see *Schneider*, cited above, § 53). The German hunting legislation is applicable to private and public property alike (see paragraph 30 above). There is, however, some differential treatment depending on the size of the plot of land (see paragraphs 29 and 30 above).

89. Having regard to the above, the Court finds that the differences between the relevant laws on these issues cannot be considered decisive. The nationwide application of the law in Luxembourg did not prevent the Court from finding a violation of Article 1 of Protocol No. 1 in the case of *Schneider*. The same conclusion could be drawn in Germany because, since 1 September 2006, the *Länder* have the power to legislate in this sphere and are now free to enact different rules on hunting. It can be inferred from this that hunting does not necessarily have to be regulated in a uniform way throughout the Federal territory.

*(iii) Compensation granted to landowners*

90. As to the compensation awarded to landowners in return for the use of their land for hunting, the Court observes that the French law did not grant landowners who were opposed to hunting any financial compensation for being obliged to tolerate hunting, but allowed every member of the hunting association to hunt throughout the common hunting district (see *Chassagnou and Others*, cited above, § 82). Conversely, both the Luxembourg and the German legislation provided/provide for members of the association to receive a proportionate share of the profits from the leasehold. In Luxembourg, the specific landowner in question was entitled to EUR 3.25 per year (see *Schneider*, cited above, § 49). In Germany, compensation is granted only when explicitly requested and appears to be, in any event, very limited (see paragraphs 53 and 62 above). The Court further notes that landowners in Luxembourg and Germany had/have the right to be compensated for any damage caused by game or by the hunt (see *Schneider*, cited above, § 37, and paragraph 32 above).

91. It appears that the applicant in the present case did not request the compensation to which he was entitled under German law for being required to tolerate hunting on his land. In the Court’s view, however, it does not sit comfortably with the very notion of respect for an ethical objection to require the objector to approach the relevant bodies for compensation in respect of the very matter that forms the basis for his

objection. Such an act could be considered, in itself, to be incompatible with the ethical convictions held by the applicant (see paragraphs 12 and 53 above). Moreover, the Court has misgivings of principle about the argument that strongly-held personal convictions could be traded against annual compensation for the restrictions on the use of the property, which in any event appears to be very limited (see, *mutatis mutandis*, *Schneider*, cited above, § 49).

92. Lastly, the Court observes that the Federal Hunting Act leaves no room for the ethical convictions of landowners who are opposed to hunting to be taken into account. In the Court's view, the documents produced by the Government (see paragraph 24 above) – according to which the applicant's land was leased to a farmer who used the land for raising cattle destined for slaughter – are not sufficient to cast doubt on the seriousness of the applicant's convictions, as opposition to hunting cannot be equated with opposition to the slaughtering of animals for human consumption. Moreover, in the light of the material before it, the Court sees no reason to call into question the truthfulness of the applicant's assertion that he never saw any cattle on his land, never gave permission for the land to be used in that way and would take legal action to prevent or stop any abuse.

*(iv) Conclusion*

93. To sum up, the Court observes that all three legal systems pursued or pursue similar objectives and provided, or continue to provide, for certain territorial exceptions of varying degrees. The issue of compensation is/was regulated in a very similar way in Germany and Luxembourg, while the French system differed in this respect. Under these circumstances, the Court is not convinced that the situation encountered in Germany is substantially different from those examined by the Court in the cases of *Chassagnou* and *Schneider*. Therefore, the Court sees no reason to depart from its findings in those two judgments, namely that the obligation to tolerate hunting on their property imposes a disproportionate burden on landowners who, like the applicant in the present case, are opposed to hunting for ethical reasons.

94. It follows that there has been a violation of Article 1 of Protocol No. 1 to the Convention.

## III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL No. 1

95. The applicant submitted that the Federal Hunting Act discriminated against him in two ways. Firstly, he was discriminated against *vis-à-vis* owners of real property which did not belong to a hunting district, such as enclaves, which were not subject to hunting rights. Secondly, the relevant provisions discriminated against the owners of smaller landholdings. He

relied on Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

## A. The Chamber judgment

96. The Chamber observed that, under German law, owners of larger plots were not allowed to suspend the hunt completely, but had to fulfil the same obligations regarding the management of game stocks as the hunting associations. A difference in treatment between the owners of smaller and larger plots existed only in so far as the latter remained free to choose the manner in which they fulfilled their obligation under the hunting laws, whereas the former merely retained the right to participate in the decision-making process within the hunting association. The Chamber considered that this difference in treatment was sufficiently justified by the need to pool smaller plots in order to allow area-wide hunting and thus to ensure effective management of game stocks. The Chamber further considered that the fact that the owners of areas which did not belong to a hunting district, such as enclaves, were treated differently was due to the specific situation regarding the plots in question, which justified a difference in treatment (see Chamber judgment, §§ 68-70). Accordingly, the Chamber did not find a violation of Article 14 in conjunction with Article 1 of Protocol No. 1.

## B. The parties' submissions

### *1. The applicant*

97. According to the applicant, the differentiation between owners of larger and smaller landholdings favoured "rich" landowners and did not satisfy the requirements of Article 14. The discrimination was not averted by the fact that the owners of large landholdings had a duty to hunt, as this duty related only to a small proportion of the animals liable to be hunted, and the landowners remained free to decide which species to hunt and how the hunt should be exercised, for example by choosing their preferred hunting method. They could even decide to suspend the hunt and to contest before the courts any order to carry out hunting. According to the applicant, no effective checks were carried out to ensure that the owners of private hunting districts actually fulfilled their obligations with regard to hunting.

98. Furthermore, the owners of private hunting districts were not obliged to tolerate either the erection of hunting facilities or the presence of strangers on their property. In addition, the owners of small plots were deprived of the possibility of observing and taking care of wildlife in its natural habitat. It followed that the transfer of the exercise of hunting rights went beyond what was necessary to prevent damage caused by wild game.

*2. The Government*

99. The Government submitted that the applicant had not been treated differently from any other landowner with regard to his rights under Article 1 of Protocol No. 1. In contrast to the French and Luxembourg laws, the German legislation ensured that all landowners were subject in equal measure to the duty to hunt. Owners of plots of more than 75 hectares retained the right to hunt but were not allowed to turn their land into hunting-free areas.

100. Furthermore, the owners of larger plots were not free to choose which species of wild game to hunt. Under the Federal Hunting Act, the shooting of game was regulated in order to ensure that a healthy population of all animal species remained in appropriate numbers and that the legitimate interests of agriculture, forestry and fishery were safeguarded. Thus, shooting was not permitted in an arbitrary way but had to be planned and carried out in a sustainable manner.

101. The erection of hunting facilities ensured that hunting could be carried out in conformity with the need to protect animals. The owners of private hunting districts who had leased out their right to hunt had to tolerate the erection of such facilities in the same way as the owners of smaller plots. Lastly, the Government submitted that any difference in treatment was justified. In order to maintain and protect game stocks by means of area-wide hunting, it was necessary to join smaller plots together. The necessary minimum area of 75 hectares had long proved its worth in Germany when it came to effective game management.

*3. The third-party interveners*

102. The DJV supported the Chamber's argument that the difference in treatment between the owners of smaller and larger plots, whereby the latter remained free to choose in which way to fulfil their obligations under the hunting legislation, was justified by the necessity of allowing area-wide hunting and thus ensuring effective management of game stocks.

103. The BAGJE emphasised that the owners of private hunting districts were obliged to hunt on their own or to lease the rights to a hunter. All owners of hunting grounds were obliged to fulfil the annual shooting quotas approved by the administrative authorities and had to inform the competent authorities each year of the total number of animals shot. They were also

obliged to comply with administrative orders regarding the exercise of hunting, for instance, orders to reduce the game population in the event of a risk of the spread of animal diseases. Unlike the situations examined by the Court in France and Luxembourg, therefore, the German legislation did not confer an advantage on the owners of private hunting grounds.

### C. The Grand Chamber's assessment

104. The Grand Chamber reiterates that Article 14 has no independent existence, but plays an important role by complementing the other provisions of the Convention and the Protocols, since it protects individuals, placed in similar situations, from any discrimination in the enjoyment of the rights set forth in those other provisions. Where a substantive Article of the Convention has been invoked both on its own and together with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to consider the case under Article 14 also, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case (see *Dudgeon v. the United Kingdom*, 22 October 1981, § 67, Series A no. 45, and *Chassagnou and Others*, cited above, § 89).

105. In the present case, having regard to its findings under Article 1 of Protocol No. 1 (see paragraphs 93-94 above), the Court considers that there is no need to give a separate ruling on the applicant's complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (see *Schneider*, cited above, § 55).

## IV. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

106. The applicant submitted that his obligation to tolerate hunting on his property violated his right to freedom of thought and conscience under Article 9 of the Convention, which provides:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

### A. The Chamber judgment

107. The Chamber did not find it necessary to determine whether the applicant's complaint fell to be examined under Article 9. With regard to its

findings under Article 1 of Protocol No. 1, it considered any potential interference with the applicant's rights under Article 9 to have been necessary in the interest of public safety, for the protection of public health and for the protection of the rights of others. It followed that there had been no violation of that provision (see Chamber judgment, § 87).

## B. The parties' submissions

### *1. The applicant*

108. According to the applicant, the Federal Constitutional Court had held that his convictions as an opponent of hunting attained a certain level of cogency, cohesion and importance and therefore deserved consideration in a democratic society. His compulsory membership of the hunting association had deprived him of the possibility of acting in accordance with his moral beliefs.

109. The Federal Constitutional Court's argument according to which no one could derive from the right to freedom of conscience a right to have his or her own ethical persuasions made the yardstick of the entire legal system (see paragraph 20 above) failed to appreciate the degree and significance of individual freedom of conscience, which was "sacrificed" to the right of third parties to hunt, a right that was protected neither by the German Constitution nor by the Convention. Compulsory membership of a hunting association increased the pressure to which a person was subjected when obliged to engage in activities contrary to his or her views.

110. The interference was not justified under Article 9 § 2 of the Convention. In view of the significance of the public interest in the practice of hunting, which was at best low, it was necessary to grant priority to the applicant's right to freedom of conscience over the right of third parties to carry out hunting on his land.

### *2. The Government*

111. According to the Government, the applicant's rights under Article 9 had not been violated. They emphasised that the applicant was not obliged to hunt or to be involved in any activity which was not compatible with his convictions. The decision to permit hunting was not taken by the applicant, but by the law in the general public interest. The question was solely whether the applicant, by relying on Article 9 of the Convention, could prevent third persons from hunting on his property.

112. Relying on the Court's decision in the case of *Pichon and Sajous v. France* (no. 49853/99, ECHR 2001-X), the Government considered that Article 9 did not confer on those concerned the right to impose their ethical, religious or moral convictions on others, especially if they could also

express their ideas by other means. The applicant remained free to publicly enlist support for his moral views by taking part in the democratic process.

113. According to the provisions of the Federal Hunting Act, ownership of land did not comprise the power to ban third parties from entering that land in order to carry out hunting in the general interest. In that regard it was worth noting that the Convention institutions had expressly held that applicants could not invoke Article 9 in order to avoid paying taxes on the grounds that those taxes were used to fund military actions (the Government referred to *C. v. the United Kingdom*, no. 10358/83, Commission decision of 15 December 1983, Decisions and Reports (DR) 37, p. 142) and that the public interest in the protection of health was sufficient to justify the duty to wear a motorbike helmet, even if this obligation stood in the way of a Sikh's obligation to wear a turban (the Government cited *X. v. the United Kingdom*, no. 7992/77, Commission decision of 12 July 1978, DR 14, p. 234).

114. The Government further submitted that the applicant had leased his land to a farmer who kept on the property cattle destined for slaughter (see paragraph 24 above). According to the Government, this shed an interesting light on the applicant's conscience as far as the killing of animals was concerned. Furthermore, the applicant had never tried to find a way out of the alleged conflict of conscience, for instance by selling the plots of land in question and buying land in an urban area or by trying to influence the decision-making process within the hunting association in accordance with his ethical convictions.

*3. The third-party interveners*

115. The DJV submitted that under German law the right to hunt on small properties was unrelated to the ownership of property. The transfer of the hunting rights over small landholdings to the hunting association was performed by the legislature. There was thus no need for individual landowners to transfer any of their rights and they could not experience a moral conflict in that respect.

116. The BAGJE submitted that German hunting associations – unlike those in Luxembourg– were not authorised to decide whether hunting should be carried out on their hunting grounds. The obligation to hunt was a purely legislative decision which was independent of membership in a hunting association. It followed that membership in a hunting association did not lead to an obligation to tolerate hunting liable to infringe landowners' freedom of conscience.

117. The European Centre for Law and Justice (ECLJ) stressed that the Court had acknowledged that Article 9 of the Convention encompassed a right to conscientious objection in the case of *Bayatyan* (cited above, § 111) regarding military service, and in the case of *R.R. v. Poland* (no. 27617/04, § 206, ECHR 2011) regarding the performing of abortions by medical

professionals. Furthermore, in the judgments in *Chassagnou* (cited above, § 117) and *Schneider* (cited above, § 82), the Court had implicitly recognised the right to conscientious objection to hunting, without giving an express ruling under Article 9. Where conscientious objection came into play, the State was under a positive obligation to find solutions capable of accommodating the competing interests in order to reconcile the requirements of individual conscience with the public interest.

118. According to the ECLJ, the obligation to tolerate hunting on one's land undoubtedly constituted interference with freedom of conscience. Bearing in mind that blanket opposition to hunting was somewhat irrational and the fact that the interference with the applicant's freedom of conscience was largely confined to his having passively to "tolerate" hunting, the ECLJ considered that there had been a possible, but not clear, violation of Article 9 of the Convention. Conversely, the obligation to join a hunting association constituted interference with the negative right of freedom of conscience. In other words, the applicant was forced to act against his conscience, in breach of his right to conscientious objection under Article 9.

### C. The Grand Chamber's assessment

119. Having regard to its findings under Article 1 of Protocol No. 1 (see paragraphs 93 and 94 above), the Grand Chamber considers that it is not necessary to examine separately the complaint under Article 9 of the Convention.

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

120. 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

121. The applicant claimed EUR 10,000 in respect of pecuniary and non-pecuniary damage. He pointed out that he had sacrificed a large amount of his free time for the conduct of the proceedings before the domestic courts.

122. The Government submitted that the applicant had failed to specify his claims and to submit documentary evidence supporting them.

123. The Court notes that the applicant did not supply any evidence capable of supporting his claims for pecuniary damage. It is therefore not appropriate to award any compensation under that head. The Court

considers, however, that on account of the violations found the applicant must have sustained a certain degree of non-pecuniary damage, which it assesses, on an equitable basis, at EUR 5,000.

### B. Costs and expenses

124. Relying on the relevant bills of costs, the applicant also claimed a total of EUR 3,861.91 (including VAT) for the translation expenses incurred before the Court.

125. The Government did not submit any comments.

126. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

127. Regard being had to the documents in its possession, the Court considers it reasonable to award in full the sum claimed by the applicant in respect of costs and expenses (EUR 3,861.91).

### C. Default interest

128. The Court considers it appropriate that the default interest rate 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. *Holds* unanimously that it does not have jurisdiction to examine the complaints under Articles 8 and 11 taken alone and in conjunction with Article 14 of the Convention;

2. *Holds* by fourteen votes to three that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds* by sixteen votes to one that it is not necessary to examine separately the complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1;

4. *Holds* by sixteen votes to one that it is not necessary to examine separately the complaint under Article 9 of the Convention;

5. *Holds* by fourteen votes to three
   (a) that the respondent State is to pay the applicant, within three months, the following amounts:
      (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 3,861.91 (three thousand eight hundred and sixty-one euros and ninety-one cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 June 2012.

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| Michael O'Boyle | Nicolas Bratza |
| Deputy Registrar | President |

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

(a) Partly concurring and partly dissenting opinion of Judge Pinto de Albuquerque;

(b) Joint dissenting opinion of Judges David Thór Björgvinsson, Vučinić and Nußberger.

N.B.
M.O.B.

# PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

The *Herrmann* case is about conscientious objection to hunting. The applicant relies on his right to property and his right to object to hunting on his plot of land, while the Government invoke the obligation on all landowners to manage game stocks and protect the ecological balance, giving rise to a duty to join a hunting association and to tolerate hunting by third parties on their land. Animals and the ecological balance are at the centre of this case, the views of the parties differing on the most appropriate means of protecting both. In other words, the question put by the applicant is intimately related to "mankind's true moral test", of which Milan Kundera once spoke[1]. The test is not limited to the question of social restrictions on the right to property, but encompasses the question of the protection of animals within the framework of the European Convention on Human Rights ("the Convention"). Since the first of these questions was already dealt with in a previous Grand Chamber case, the case also raises the complex problem of determining the weight of a judicial precedent for the purposes of the Convention. I agree with the judgment of the Grand Chamber in finding a violation of Article 1 of Protocol No. 1, but disagree with regard to the finding that it was not necessary to examine separately the complaints under Article 9 and Article 1 of Protocol No. 1 taken in conjunction with Article 14. The reasons for my disagreement will be presented with an eye to the current interface between international human rights law and international environmental law.

## The protection of animals by the Convention

Animals are protected by the Convention in two ways: as property and as beings in themselves. Animals are "possessions" within the meaning of Article 1 of Protocol No. 1[2]. This has two consequences: (1) the full Convention protection system is available to animal owners in order to guarantee the peaceful enjoyment of their possessions, and (2) the State can impose restrictions on the use of animals by their owners on the basis of the second paragraph of Article 1 of Protocol No. 1, and may punish deliberate or involuntary infringements of these restrictions. But not all animals are possessions. Wild, abandoned or stray animals are also protected by the Convention as a part of a healthy, balanced and sustainable environment.

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[1] "Mankind's true moral test, its fundamental test (which lies deeply buried from view), consists in its attitude towards those who are at its mercy: animals." In Milan Kundera, *The Unbearable Lightness of Being*, 1984.

[2] See *Akkum and Others v. Turkey*, no. 21894/93, § 276, ECHR 2005-II, and *Doğan and Others v. Turkey*, nos. 8803-8811/02, 8813/02 and 8815-8819/02, § 54, ECHR 2004-VI.

Article 8 provides for an obligation on the State to avoid acts and activities that could have detrimental consequences for public health and the environment[3], and more specifically an obligation on the State to ensure and promote public health regarding the control of wild, abandoned and stray animals[4], ill animals[5] and domestic animals[6]. The clear public interest in various matters concerning animal welfare has also been frequently stressed in the light of the Convention guarantee of freedom of expression[7]. Finally, the Court has unequivocally rejected the existence of a Convention right to hunt[8] or a right to take part in person in the performance of ritual slaughter[9].

The Court's protection of animals is in line with a contemporary legal trend which distinguishes animals from objects and associates the protection of animals with the broader protection of the environment. This trend has been consolidating not only in the civil and constitutional laws of several countries, but also in international human rights law and international environmental law.

In several countries, the Roman-law notions of animals as *res* and wild animals as *res nullius* have been abandoned. The formal legal distinction between animals and objects was introduced in Austria with the entry into force of Article 285a of the Civil Code (*Bürgerliches Gesetzbuch*) in 1986, which was followed by the approval of Article 90a of the German *Bürgerliches Gesetzbuch* in 1990, Article 1 of the Polish Animal Protection Act in 1997, Article 528 of the French *Code Civil* in 1999, Article 641a of

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[3] See *López Ostra v. Spain*, 9 December 1994, § 51, Series A no. 303-C, and *Guerra and Others v. Italy*, 19 February 1998, § 60, *Reports of Judgments and Decisions* 1998-I.

[4] See *Georgel and Georgeta Stoicescu v. Romania*, no. 9718/03, § 59, 26 July 2011. The Court's willingness to assess the impact of urban development policy on protected species had been made clear previously in *Kyrtatos v. Greece*, no. 41666/98, § 53, ECHR 2003-VI.

[5] On the preventive slaughter of animals see *Chagnon and Fournier v. France*, nos. 44174/06 and 44190/06, § 57, 15 July 2010.

[6] On the supervision of slaughterhouses see *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, § 77, ECHR 2000-VII.

[7] See *Verein gegen Tierfabriken Schweiz (Vgt) v. Switzerland* (no. 2) [GC], no. 32772/02, § 92, ECHR 2009, and *Vgt Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, §§ 70, 71 and 75, ECHR 2001-VI (rearing of animals); *Steel and Morris v. the United Kingdom*, no. 68416/01, §§ 89 and 95, ECHR 2005-II (fast-food meat industry); *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 28, ECHR 1999-VIII (hunting saboteurs); *Steel and Others v. the United Kingdom*, 23 September 1998, § 92, *Reports* 1998-VII (hunting saboteurs); Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, §§ 63 and 73, ECHR 1999-III (brutal killing of animals); and *Barthold v. Germany*, 25 March 1985, § 58, Series A no. 90 (lack of availability of veterinary surgeons during the night).

[8] See *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 113, ECHR 1999-III, and *Friend and Countryside Alliance v. the United Kingdom* (dec.), no. 16072/06 and no. 27809/08, §§ 43-44, 24 November 2009.

[9] See *Cha'are Shalom ve Tsedek*, cited above, § 82.

the Swiss Civil Code (*Zivilgesetzbuch*) in 2002 and Article 287 of the Moldovan Civil Code in 2002. According to these provisions, animals are not objects, although some features of the rules governing objects may apply to animals by analogy.

Some Constitutions provide for the protection of animals in general. Examples include Articles 84 § 1, 104 § 3 (b) and 120 § 2 of the Swiss Constitution, Article 20a of the German Basic Law, Article 11*bis* § 2 of the Luxembourg Constitution, Article 51-A (g) of the Constitution of India, Article 225 § 1 VII of the Brazilian Constitution and Article 39 § 2 of the Angolan Constitution. Other Constitutions have gone a step further, protecting a particular species or group of species of animals, as in the case of Article 178-A of the Constitution of the Canton of Geneva (prohibiting the hunting of mammals and birds), Article 48 of the Indian Constitution (preserving and improving breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle), section 16 of Article X (limiting marine net fishing) and section 21 of Article X (limiting cruel and inhumane confinement of pigs during pregnancy) of the Constitution of the State of Florida, as well as Article 9 of the Chinese Constitution (protecting "rare" animals).

Furthermore, a broad concept of environment balance which includes animal life and welfare, encompassing animals not only as members of a single species or a group of species but also as individual living beings capable of experiencing fear, suffering and pain, has been repeatedly enshrined in international environmental law as established within the United Nations[10], the Organization of African Unity[11], the Organization of American States[12], the Association of Southeast Asian Nations[13], the World

[10] See the 1972 Stockholm Declaration approved at the UN Conference on the Human Environment, the preamble to the World Charter for Nature approved by the UN General Assembly (UNGA RES 37/7, 1982), paragraph 11 of the preamble and Article 17 of the Universal Declaration on Bioethics and Human Rights adopted by the General Conference of UNESCO on 19 October 2005, and at treaty level, the 1971 Ramsar Convention on Wetlands of International Importance, the 1973 Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora, the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals, the 1980 Canberra Convention for the Conservation of Antarctic Marine Living Resources and the 1992 Rio Convention on Biological Diversity.

[11] See the African Convention on the Conservation of Nature and Natural Resources, adopted in 1968 in Algiers, and its 1982 Protocol.

[12] See the 1992 Managua Convention for the Conservation of the Biodiversity and the Protection of Wilderness Areas in Central America and the 1993 Guatemala Regional Convention on the management and conservation of natural forest ecosystems and forest plantation development.

Trade Organization,[14] the World Organization for Animal Health[15], and especially the Council of Europe and the European Union.

Among international organisations the Council of Europe and the European Union stand out as the most prolific and effective upholders of animal welfare. The Council of Europe has developed a considerable body of international animal welfare law which includes the 1968 Convention for the Protection of Animals during International Transport (with its 1979 Additional Protocol), the 1976 Convention for the Protection of Animals kept for Farming Purposes (with its 1992 Additional Protocol), the 1979 Convention for the Protection of Animals for Slaughter, the 1979 Convention on the Conservation of European Wildlife and Natural Habitats, the 1986 Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes (with its 1998 Additional Protocol) and the 1987 Convention for the Protection of Pet Animals[16].

The European Union has conferred the highest legal ranking on the protection of animals as "sentient beings", including it in a "Protocol on

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[13] See the 1985 Kuala Lumpur Agreement on the Conservation of Nature and Natural Resources, which was anticipated by the 1976 Convention on the Conservation of Nature in the South Pacific.

[14] Within the WTO the most significant case was the shrimp-turtle case, India et al. v. U.S. The WTO Panel ruling of 6 November 1998, modified by the WTO Appellate Body ruling of 21 November 2001, concerning the US ban on the import of certain shrimp and shrimp products from India and other countries, recognised under WTO rules the right to protect animal or plant life and health and to take measures to conserve exhaustible resources.

[15] See the Terrestrial Animal Health Code, which includes standards on, *inter alia*, transport of animals by land, sea or air, slaughter of animals for human consumption, killing of animals for disease control purposes, control of stray dog populations and use of animals in research and education.

[16] Soft law has also been an important political instrument for the implementation of a European standard of animal welfare. For that purpose the Parliamentary Assembly approved Recommendation 287 (1961) on the international transit of animals, Recommendation 621 (1971) on the problems arising out of the use of live animals for experimental or industrial purposes, Recommendation 620 (1971) on problems of animal welfare in industrial stock-breeding, Recommendation 641 (1971) on animal welfare in industrial stock-breeding, Order 326 (1972) on an information campaign on animal welfare, Recommendation 709 (1973) on slaughter methods for meat animals, Recommendation 825 (1978) on protection of wildlife and on seal hunting, Recommendation 860 (1979) on dangers of over-population of domestic animals for the health and hygiene of man and on humane methods of limiting such dangers, Order 419 (1983) on protection of animals in experimental procedures, Recommendation 1084 (1988) on the situation of zoos in Europe, Recommendation 1143 (1991) on relations between animal husbandry and the quality of the environment, Resolution 1012 (1993) on marine mammals, Recommendation 1289 (1996) on animal welfare and livestock transport in Europe, Opinion 245 (2003) on the draft revised Convention for the protection of animals during international transport, Recommendation 1689 (2004) on hunting and Europe's environmental balance, and Recommendation 1776 (2006) on seal hunting.

protection and welfare of animals" to the Treaty of Amsterdam. The Protocol, which applies only to animals bred or kept for farming purposes, provides as follows: "In formulating and implementing the Community's agriculture, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals...". This legally binding obligation was supplemented by four general legal instruments, namely Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport, Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing, Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes, and Directive 2010/63/EU of the European Parliament and the Council on the protection of animals used for scientific purposes[17]. The Treaty on the functioning of the European Union reiterated that "the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals..." (Article 13)[18]. The protection of wild fauna is based on Article 191 of the Treaty on the functioning of the European Union, replacing Article 174 of the former TEC which was implemented by Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

This "clear and uncontested evidence of a continuing international trend" in favour of the protection of animal life and welfare is reflected in the application of the Convention[19]. As one of the hallmarks of international and European law in contemporary times, the protection of animal life and welfare has also been upheld under the Convention, although this protection is still viewed as a derivative effect of a human right to property or to a healthy, balanced and sustainable environment. The evolving position of the

[17] In its judgment in case C-416/07, the Court of Justice of the European Union decided that Greece had failed to fulfil its obligations under Council Directive 91/628/EEC and Council Directive 93/119/EC to ensure, *inter alia*, that the rules on the stunning of animals at the time of slaughter were complied with and that inspections and controls in slaughterhouses were carried out in an appropriate manner.

[18] Specific legislation has been enacted on laying hens (Council Directive 1999/74/EC), chickens kept for meat production (Council Directive 2007/43/EC), calves (Council Directive 2008/119/EC), pigs (Council Directive 2008/120/EC), wild animals kept in zoos (Council Directive 1999/22/EC) and on special animal welfare standards for cattle, pig and poultry production in organic farming (Council Regulation (EC) 834/2007 and Commission Regulation (EC) 889/2008). Two recent pieces of legislation, Directive 2007/43/EC and Regulation (EC) 1099/2009 on the protection of animals at the time of killing, introduced outcome-based animal welfare indicators. In addition, the Commission adopted the Community Action Plan on the Protection and Welfare of Animals 2006-2010 (COM(2006)13final), which was followed by the European Union Strategy for the Protection and Welfare of Animals 2012-2015 (COM(2012)6final/2).

[19] The expression is drawn from *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 85, ECHR 2002-VI.

Court shows that it is ready to reject both extremes: neither the commodification of animals nor their "humanisation" reflects the actual legal status of animals under the Convention. In other words, animals are viewed by the Convention as a constitutive part of an ecologically balanced and sustainable environment, their protection being incorporated in a larger framework of intra-species equity (ensuring healthy enjoyment of nature among existing humans), inter-generational equity (guaranteeing the sustainable enjoyment of nature by future human generations) and inter-species equity (enhancing the inherent dignity of all species as "fellow creatures")[20]. In short, the Convention supports a qualified *speciesism* which builds upon a responsible anthropocentrism.

The fundamental incommensurability of the positions of humans and animals is borne out in the essentially different status (*Wesensverschiedenheit*) of humans who cannot be held responsible for their actions and animals. Children, the mentally ill and persons in a coma or a vegetative state are not in essence the same as animals. But the undisputed and undisputable evidence of this incommensurability does not prevent us from acknowledging the inherent dignity of all species living on the planet and the existence of basic comparable interests between humans and other animals and therefore the need to safeguard certain "animal rights", metaphorically speaking, in a similar way to human rights[21].

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[20] For the intrinsic value of nature see the preamble to the 1979 Berne Convention on the Conservation of European Wildlife, cited above, the preamble to the World Charter for Nature, cited above, Article 3 of the 1991 Protocol to the Antarctic Treaty on Environmental Protection and the preamble to the 1992 Rio Convention on Biological Diversity. The intrinsic value of all species has been expressed in the German-speaking countries by the felicitous expressions "fellow creatures" (*Mitgeschöpfe*, introduced in 1986 in section 1 of the German *Tierschutzsgesetz*) or "dignity of creatures" (*Würde der Kreatur*, enshrined in 1992 in Article 120 of the Swiss Federal Constitution), both inspired by the teachings of Fritz Blanke ("*Wir sind, ob Mensch oder Nichtmensch, Glieder einer grossen Familie. Diese Mitgeschöpflichkeit (als Gegenstück zur Mitmenschlichkeit) verpflichtet"*, in Unsere Verantwortlichkeit gegenüber die Schöpfung, in Festschrift Brunner, Zurich, 1959, p. 195). The same understanding is reflected in the expression "sensitive being" (*être sensible*) of article L. 214-1 of the French Rural Code, which encompasses "the mental health" (*santé psychique*) of the animal, as interpreted by the judgment of the Paris Court of Appeal of 14 November 2011.

[21] Article 14 (2) of the Universal Declaration on Animal Rights adopted by the International League of Animal Rights and Affiliated National Leagues in the course of an International Meeting on Animal Rights which took place in London in September 1977, and the preamble to and Article 1 of the Universal Declaration of Animal Rights, proclaimed on 15 October 1978 at UNESCO headquarters and revised by the International League of Animal Rights in 1989. While these texts affirm the existence of "animal rights" within the context of biological equilibrium, they also clearly state that the acknowledgment of these rights does not overshadow the diversity of species and of individuals.

Under the Convention, "animal rights" are not legal claims attributed to animals and exercisable through a representative[22], but instead correspond to obligations imposed on the Contracting Parties as part of their commitment to full, effective and practical enjoyment of human rights, and specifically of a human right to a healthy and sustainable environment. Hence, human rights are not trivialised by the surreptitious intrusion of animals into the realm of rational beings, instead they are enriched with the sense of mankind's full responsibility for the destiny of other species, natural ecosystems and, more broadly, the environment[23]. This responsibility can be formulated legally in positive as well as negative terms. In negative terms, the safeguarding of the environment and animal life constitutes an implicit restriction on the exercise of human rights[24]. In positive terms, it constitutes an inherent obligation on the Contracting Parties bound by the Convention. From this perspective, environmental rights and "animal rights" do not fit neatly into any single category or generation of human rights, but straddle all three classical categories, showing that international human rights law has considerable potential for environmental and animal protection[25].

## Conscientious objection to hunting

The instant case tests the Convention's qualified *speciesism*. The applicant is opposed to hunting on conscientious grounds. The substance of the applicant's complaint must be assessed in the light of the standard set out above. The Government claim that the individual conscience of the

[22] See *Balluch v. Austria*, no. 26180/08, application lodged on 4 May 2008 by an animal protection activist on behalf of a chimpanzee, and rejected by a committee of the First Chamber for incompatibility *ratione materiae*. The same happened in *Stibbe v. Austria*, no. 26188/08, application lodged on 6 May 2008.

[23] That same sense of mankind's responsibility for animal life and welfare has been stressed by the UNGA in the preamble to the World Charter for Nature, by UNESCO in paragraph 11 of the preamble to and Article 17 of the Universal Declaration on Bioethics and Human Rights and by the Council of Europe in Recommendation (91)7 on the slaughter of animals, the Convention for the Protection of Vertebrate Animals used for Experimental and Other Scientific Purposes and the Convention for the Protection of Pet Animals.

[24] On the restriction of the right to property on environmental protection grounds, see *Fredin v. Sweden (no. 1)*, 18 February 1991, § 48, Series A no. 192; *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, § 57, Series A no. 222; *Saliba v. Malta*, no. 4251/02, § 44, 8 November 2005; and *Hamer v. Belgium*, no. 21861/03, § 79, ECHR 2007-V.

[25] For instance, freedom of expression does not cover any form of art which tortures animals, or the commercial creation, sale or possession of certain depictions of animal cruelty such as "crush videos", which feature the torture and killing of helpless animals and are said to appeal to persons with a specific sexual fetish (see the opinion of Justice Alito in United States v. Stevens, 559 U.S. (2010)).

applicant cannot be the moral yardstick against which the legal order of a democratic State such as Germany should be measured[26]. It is true that not every conviction, genuine though it may be, will constitute a sufficient reason for claiming conscientious objector status. But the Government's argument can be reversed. The legal order of a democratic State is not compatible with the blanket refusal of an "animal-friendly vision of the world" (*tierfreundliche Weltanschauung*)[27] which has a solid philosophical basis acknowledged by the Court, various international organisations and the German legislature itself. Put another way, democratic States cannot reject the right to conscientious objection based on the idea of animal welfare, an idea which fosters a sense of solidarity between humans and other living beings and ultimately promotes the "dignity of all creatures".

In fact, the applicant is not alone in his defence of animal welfare and his rejection of hunting as a form of ill-treatment of animals. A respectable philosophical tradition advocates a change in the way humans deal with animals, based on the premise of the shared nature of all human and non-human animals. The names of Montaigne[28], Rousseau[29], Voltaire[30], Bentham[31], Schopenhauer[32] and Bertrand Russell[33] can be counted among

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[26] The same argument was made by the Federal Constitutional Court in its judgment of 13 December 2006, paragraph 26.

[27] In page 35 of his application to the Federal Constitutional Court, the applicant considers himself as a *tierliebender Mensch* (animal-loving person).

[28] In modern times, the philosophical question of the nature of animals started with a simple question, which was nonetheless full of meaning, posed by Michel de Montaigne in *Apology for Raymond Sebond*, 1580: "When I play with my cat, who knows whether I do not make her more sport than she makes me? We mutually divert one another with our play".

[29] Rousseau, *Discourse on the Origin of Inequality*, 1754: "… we put an end to the time-honoured disputes concerning the participation of animals in natural law: for it is clear that, being destitute of intelligence and liberty, they cannot recognize that law; as they partake, however, in some measure of our nature, in consequence of the sensibility with which they are endowed, they ought to partake of natural right; so that mankind is subjected to a kind of obligation even toward the brutes."

[30] Voltaire, *Philosophical Dictionary*, 1764: "What a pitiful, what a sorry thing to have said that animals are machines bereft of understanding and feeling, which perform their operations always in the same way, which learn nothing, perfect nothing, etc.!"

[31] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, 1789: "The day may come when the rest of the animal creation may acquire those rights which never could have been withheld from them but by the hand of tyranny. … What else is it that should trace the insuperable line? Is it the faculty of reason or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day or a week or even a month, old. But suppose the case were otherwise, what would it avail? The question is not, Can they reason?, nor Can they talk? but, Can they suffer?"

[32] Schopenhauer, *On the Basis of Morality*, 1839: "The moral incentive advanced by me as the genuine, is further confirmed by the fact that the animals are also taken under its protection. In other European systems of morality they are badly provided for, which is

many others who endorsed this tradition, which penetrated very different schools of thought.

In addition, the German constitutional legislature took a significant step aimed at protecting animal welfare with the 2002 constitutional reform, in response to the social uproar caused by the so-called "Ritual slaughter decision" of the Federal Constitutional Court that same year[34]. The political motivation for the constitutional reform was the following: "[T]he protection of animals is today given a higher status. The decisions of different courts show a trend in the case-law towards taking this change of mentality into account in the constitutional interpretation ... through the addition of the words "and the animals" in Article 20a of the Basic Law, protection is extended to individual animals (*auf die einzelnen Tiere*). The ethical protection of animals is thus given constitutional status"[35]. By elevating the issue of animal protection to the pinnacle of constitutional law, the national legislature not only set a "State objective" (*Staatsziel*) to the legislature itself, the government, the courts and other public authorities, but also established animal life and welfare as a "constitutional value" (*Verfassungswert*)[36]. In the present case, the Federal Constitutional Court

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most inexcusable. They are said to have no rights, and there is the erroneous idea that our behaviour to them is without moral significance, or, as it is said in the language of that morality, there are no duties to animals…"

[33] Bertrand Russell, *If Animals Could Talk*, 1932: "There is no impersonal reason for regarding the interests of human beings as more important than those of animals. We can destroy animals more easily than they can destroy us; that is the only solid basis of our claim to superiority."

[34] The *Schächt-Entscheidung* (BVerfGE 99, 1, 15 January 2002) ruled that the granting of exceptional authorisation for the slaughter of animals without previous stunning, on religious grounds, did not breach the German Basic Law.

[35] The German constitutional provision includes, according to the explanatory memorandum to the Constitutional Reform Act of 26 July 2002, a threefold guarantee: "the protection of animals against improper treatment of the species, avoidable suffering and destruction of their living space" (*den Schutz der Tiere von nicht artgemässer Haltung, vermeidbaren Leiden sowie der Zerstörung ihrer Lebensräume*, BT-Drucks. 14/8860, p. 3). Prior to the constitutional reform, the German Bundestag had already declared, on 30 June 1994, that animals also formed part of the "natural foundations of life" and that the protection of species and their living space therefore fell within the constitutional ambit of ecological protection. The novelty of the constitutional reform lies in the additional protection afforded to "individual animals" (*einzelne Tiere*), based on their "capacity for suffering" (*Leidensfähigkeit*).

[36] On the protection of animals as a "principle of assessment and interpretation" (*Abwägungs and Auslegungsgrundsatz*) when public decisions are taken and when conflicts with constitutional rights arise, see, among other authorities, Hirst/Maisack/Moritz, *Tierschutzgesetz, Kommentar*, München, 2007, pp. 59-71; Kloepfer, *Umweltrecht*, München, 2004, pp. 62, 945-946, 963; Scholz, annotations 7, 49, 70, 76, 79 and 84 to Article 20a, in Maunz/Dürig, *Grundgesetz Kommentar*, III, München; Caspar and Schröter, *Das Staatsziel Tierschutz in Art.20a GG*, Bonn, 2003, p. 47-49, 94; and Caspar and Geissen, *Das neue Staatsziel "Tierschutz" in Art. 20a GG*, in NVwZ, 2002, p. 916).

and the Federal Administrative Court interpreted the new constitutional rule as being capable of influencing the way hunting was carried out, but not its legitimacy[37]. The argument is misplaced, since that is not the issue raised by the applicant. The applicant does not seek to dispute the legitimacy of hunting *per se*, either at constitutional level or at European level. He seeks only to have his ideological abhorrence of hunting accepted as a legitimate conviction from the standpoint of Article 4 of the *Grundgesetz* and Article 9 of the Convention. The constitutional status of the protection of animals under Article 20a of the Basic Law is an unequivocal factor legitimising this conviction.

Furthermore, the nature of the applicant's conscientious objection satisfies the essential requirements of the Federal Constitutional Court's own dogmatic definition of a decision of conscience as a "serious ethical decision, i.e., one based on the categories of 'good' and 'bad', by which an individual in a certain situation feels unconditionally bound in his or her innermost self, so that he or she could not act against it without serious qualms of conscience"[38]. In fact, the applicant opposes hunting for absolute and unconditional ethical reasons, regardless of the species of animals concerned or the weapons and methods used by the hunters. Such a belief cannot but be found to constitute a serious conscientious objection.

Finally, the Court itself acknowledged that the objection to hunting is worthy of respect in a democratic society. The right to object to hunting on conscientious grounds comes within the ambit of protection of Article 9. It has the required level of "cogency, cohesion and importance" to be "worthy of respect in a democratic society"[39]. Although that statement was made with regard to the freedom of association enshrined in Article 11, the cogency of conscientious objection to hunting is equally valid for the purposes of Article 9. This conclusion is even more compelling when one bears in mind the derivative protection of animals under the Convention, referred to above, and the rejection of a Convention right to hunt. As the Court has already affirmed, where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect "rights and freedoms" not, as such, enunciated therein, "only indisputable imperatives" can justify interference with enjoyment of the Convention right or freedom[40]. Since there is no Convention right to hunt, any restriction imposed on the Convention right to freedom of thought requires evidence of

[37] Federal Constitutional Court judgment of 13 December 2006, paragraph 16, and Federal Administrative Court judgment of 14 April 2005, paragraph 23.
[38] BVerfGE 12, 45 - *Kriegsdienstverweigerung I*, 20 December 1960.
[39] See *Chassagnou and Others*, cited above, § 114. This statement of principle was reiterated in *Schneider v. Luxembourg*, no. 2113/04, § 82, 10 July 2007.
[40] See *Chassagnou and Others*, cited above, § 113.

an "indisputable imperative", which the Government has not adduced in the instant case. On the contrary, the animal-friendly philosophical stance of the applicant is in complete harmony with the derivative protection of animals afforded by the Convention.

The ambit of the right to conscientious objection includes not only the freedom to act according to one's beliefs, but also the freedom not to act, not to associate and not to tolerate actions from others which contradict one's personal convictions. In the applicant's case, the mere fact that he is a member *de iure* of the hunting association entails obligations and duties such as the duty not to fence off his land or in any other way impede the hunt and even the duty not to protect injured game. These duties run directly counter to his convictions and impose on him a way of life and a rule of behaviour incompatible with his beliefs. Thus, it is irrelevant that the applicant is not himself obliged to hunt or to take part in or support hunting[41]. Furthermore, the applicant is faced with a true conflict of conscience: either he remains faithful to his conscience and opposes hunting on his property and thus breaks the law, or he complies with the law and tolerates hunting on his property but breaches his conscience[42]. Ultimately, the applicant would have to give up any land owned by him in hunting areas in order to avoid breaking the law or breaching his conscience. Such a *capitus diminutio* of persons opposed to hunting for reasons of conscience is not tolerable in a democratic society.

Moreover, the applicant is not imposing his conscience on others, as the Federal Administrative Court claimed[43]. It is obvious that hunters are free to hunt when and for how long they want in spite of the applicant's opinion on hunting. It is not the applicant who is interfering with the property or hunting rights of third parties. It is the hunting rights of third parties which are interfering with the applicant's rights to property and conscience. While the "power to dispose" (*Verfügungsmacht*) of his plot of land is not restricted, it is undeniable that the applicant's "power to make use" (*Nutzungsmacht*) of the land is interfered with when strangers enter his property against his will, shooting and killing animals against the dictates of his conscience. The applicant's duty to tolerate (*Toleranzpflicht*) hunting on

[41] Contrary to the reasoning of the Federal Constitutional Court judgment of 13 December 2006, paragraph 25, and Federal Administrative Court judgment of 14 April 2005, paragraph 18.

[42] The conflict of conscience between obeying national law and upholding a higher ethical principle acknowledged by the international community has been articulated in *Polednová v. the Czech Republic* ((dec.), no. 2615/10, 21 June 2011), which reaffirmed the findings of *K.-H.W. v. Germany* ([GC], no. 37201/97, ECHR 2001-II). In these particular cases, the Court criticised the applicants precisely for their inability to uphold a higher ethical standard contrary to the one affirmed by national law.

[43] See the Federal Administrative Court judgment of 14 April 2005, paragraph 18.

his plot of land does not even allow for any defensive right (*Abwehrrecht*) in relation to his own land and the game on it. The applicant's legal and ethical position towards hunting is neither an act of resistance, peaceful or otherwise, against an unjust act or unjust conduct of a public authority (*ius resistendi*), nor an active refusal to obey an unjust rule or order of a public authority in order to have it changed (civil disobedience). His opposition to the hunting rights of third parties is strictly passive, while the hunters' interference with the applicant's rights to property and conscience is active.

The Government argued further during the Grand Chamber hearing that the applicant allows cattle to be bred for slaughter on his land, pointing to a supposed inconsistency in his philosophical beliefs. Even assuming that this new allegation could be taken into account and that the alleged fact is true, which the Court could not ascertain, there is no logical reason to infer opposition to cattle slaughter from an objection to hunting. The different conditions in which the animals are killed may justify cattle slaughter but not hunting. Different methods of killing animals entail different degrees of pain, and much needless suffering can be avoided if the way in which the animal is killed is strictly regulated and the killing is performed in perfectly controlled conditions, such as in a slaughterhouse, with the animals being stunned beforehand, and is carried out by staff professionally qualified for that specific purpose[44]. Those strict conditions are not met in the normal exercise of hunting. Thus, hunting causes a certain amount of needless suffering, to which one can reasonably object.

Like Antigone, who buried her brother Polynices in compliance with the laws of the gods but against the laws of the city of Thebes forbidding the mourning of a traitor, the applicant faced a conflict of conscience between a legal rule and a higher ethical value. It is time to release him from this conflict by affirming that his claim is right and the impugned legal rule is wrong. In sum, I find that Article 9 has been breached by the respondent State, on account of both the compulsory membership of a hunting association, referred to above, and the obligation on the applicant to tolerate hunting by third parties on his land.

## Hunting as a social restriction on the right to property: the *Chassagnou* precedent

In a democratic society, property ownership entails obligations. Landowners do not have unlimited rights over their land, since the law may

[44] As the Council of Europe requires in its Convention for the Protection of Animals for Slaughter and the aforementioned Recommendation 91(7) and its Code of Conduct, and in Recommendation 1776 (2006), which considers "all … methods which do not guarantee the instantaneous death without suffering of animals" as "cruel hunting".

impose negative and positive obligations on them as long as these are necessary and proportionate in a democratic society. The right to property may come into conflict with the environment. This conflict may take the form of an environmental nuisance impacting on the Convention right or of damage caused to the environment by the exercise of the Convention right. Protection of the environment is a legitimate objective which in certain cases can justify limiting the right to property. When balancing environmental concerns against this Convention right, the Court has recognised that the national authorities are best placed to make decisions on environmental issues, which often have difficult social and technical aspects. Therefore, in reaching its judgments, the Court in principle affords the national authorities a wide discretion.

In the specific case of the conflict between the right to property and the hunting rights of third parties, the Court has already performed the required test of necessity and proportionality. The Court's conclusion was crystal clear: "Compelling small landowners to transfer hunting rights over their land so that others can make use of them in a way which is totally incompatible with their beliefs imposes a disproportionate burden which is not justified under the second paragraph of Article 1 of Protocol No. 1"[45]. Such a statement of principle, made by the Grand Chamber of the Court, has particular legal force which has to be taken into account in ruling on the applicant's claim that his rights under Article 1 of Protocol No. 1 were breached by the contested German hunting law.

It is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart from its previous case-law without cogent reasons if the circumstances of the new case are not "materially" distinct from the previous case[46]. A precedent established by the Court can be set aside when there is an emerging consensus, either in the domestic legal systems of Council of Europe member States[47], within the domestic

[45] See *Chassagnou and Others*, cited above, § 85. This statement of principle was reiterated in *Schneider*, cited above, § 51.

[46] The emblematic case is *Cossey v. the United Kingdom* (27 September 1990, § 32, Series A no. 184), where the Court considered that the case was distinguishable on its facts from the *Rees* case but was not persuaded that this difference was "material".

[47] See, among other cases, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I; *Bayatyan v. Armenia* [GC], no. 23459/03, § 103, ECHR 2011; and *Konstantin Markin v. Russia* [GC], no. 30078/06, § 140, ECHR 2012. The geographical boundaries of this criterion are flexible. In *Christine Goodwin*, cited above, § 85, the Court attached "less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend", quoting the legal situation in non-European countries.

legal order of the respondent State[48] or under specialised international instruments[49], in favour of upholding a different legal standard, or when there is new scientific knowledge impacting on the issue at stake[50]. But while the effect of a previous ruling by the Court is not limited to the persuasiveness of the reasons it provides, it does not possess the force of the *stare decisis* rule, according to which the principles of law on which a court based a previous decision are authoritative in all future cases in which the facts are substantially the same (*stare decisis et non quieta movere*, or "to stand by decisions and not disturb the undisturbed"). In fact, the Court is also willing to overrule its own case-law when the latter is uncertain[51] or needs "further development", this development being carried out with the purpose of enlarging the ambit of protection afforded by the Convention[52].

Moreover, the interpretation of the Convention as a "living instrument" which guarantees effective, not illusory, rights is intrinsically incompatible with a horizontal *stare decisis* effect of the Grand Chamber's case-law. Since the Convention must be interpreted in the light of present-day circumstances, the Grand Chamber is not bound by its own previous case-law[53]. On the contrary, the internal structure of the Court implies a vertical *stare decisis* effect of the Grand Chamber's case-law on Chamber judgments[54]. Only one exception to this rule exists: in cases where the Chamber wishes to depart from previous Grand Chamber case-law and

[48] See *Stafford v. the United Kingdom* [GC], no. 46295/99, §§ 69 and 79, ECHR 2002-IV.

[49] See *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 85, ECHR 2008; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 105, 17 September 2009; and *Bayatyan*, cited above, §§ 104-107.

[50] See *Christine Goodwin*, cited above, §§ 83 and 92, and *Vo v. France* [GC], no. 53924/00, §§ 82 and 84, ECHR 2004-VIII.

[51] The very first judgment where the new Court stated clearly its *animus mutandi* with regard to uncertain case-law was *Pellegrin v. France* ([GC], no. 28541/95, §§ 60-63, ECHR 1999-VIII), whose terms were repeated, for instance, in *Perez v. France* [GC], no. 47287/99, §§ 54-56, ECHR 2004-I.

[52] See, for example, *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, §§ 56 and 57, ECHR 2007-II. As the Court stated in its seminal case *Ireland v. the United Kingdom* (18 January 1978, § 154, Series A no. 25): "The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties". Consequently, the Court rejected a strict originalist interpretation of the Convention based on the original intentions of its framers (see *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 71, Series A no. 310, and *Mamatkulov and Abdurasulovic v. Turkey*, nos. 46827/99 and 46951/99, § 94, 6 February 2003).

[53] See *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I, based on the thesis of an evolving interpretation of the Convention first put forward in *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26.

[54] See the joint concurring opinion in *Yoh-Ekale Mwanje v. Belgium*, no. 10486/10, 20 December 2011.

relinquishes the case, but one of the parties objects to relinquishment, the Chamber may subsequently depart from the aforesaid case-law[55]. The subsequent referral of the case will give the Grand Chamber the opportunity to reassess its own case-law in the light of the impugned Chamber judgment[56]. The same exceptional situation may also occur when a Chamber wishes to depart from previous Chamber case-law. In view of the horizontal *stare decisis* effect of Chamber judgments on future Chamber judgments, the Chamber is bound by its own previous case-law or that of other Chambers, except when it relinquishes the case and one of the parties objects to relinquishment.

Thus, the consistency of the Court's case-law depends on a delicate and intricate differentiation of the legal problems and factual circumstances of the cases submitted to it. But this highly delicate task of differentiation between cases should not evolve into a subtle manipulation of the specific characteristics of the case in order to avoid application of a principle established in the Court's case-law. Any such manipulation would discredit the Court and weaken the authority of its rulings. In the case at hand, there are no substantial differences which justify non-applicability of the principle stated in *Chassagnou*. The particular characteristics of the instant case are not sufficiently different to warrant a finding that the *Chassagnou* precedent is not applicable. In other words, a manipulation of the specific characteristics of this case in order to differentiate it from the above-mentioned precedent would in fact amount to an implicit reversal of the case-law.

Regard being had to the criteria set out in the previous French and Luxembourg cases, the similarity between the instant case and those precedents can be easily demonstrated. Firstly, the aim of the French, Luxembourg and German laws is the same: game stock management. The German law, as well as the others, is based on the principle that there is no such thing as self-regulation of game stocks. The parties are not in agreement on this principle. The respondent Government produced no evidence of their allegation that the ecological balance would collapse were it not for the regulation of game stocks achieved as a result of the legal framework in force in Germany.

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[55] See the Chamber judgment in *Mamatkulov and Abdurasulovic*, cited above, which found a violation of Article 34 for non-compliance with Rule 39 and thus departed from the precedent established in *Cruz Varas and Others v. Sweden*, 20 March 1991, § 102, Series A no. 201.

[56] See the Grand Chamber judgment in *Mamatkulov and Askarov*, cited above, which upheld the Chamber judgment and definitely overturned the previous *Cruz Varas* case-law.

Secondly, although the material scope of the French and German hunting laws differs in as much as they provide for different exceptions, one cannot legitimately argue that the German law provides imperatively for a universal and mandatory restriction on the right of property based on the need to manage game stocks, while the French law (the so-called *Loi Verdeille*, in its form prior to the reform undertaken in July 2000) applied only to selected *départements* of the national territory. Since the 2006 constitutional reform the *Länder* can even abolish hunting altogether on their respective territories. Hence, a powerful constitutional argument can be derived from this political decision: since the constitutional legislature itself does not regard hunting as a universal and mandatory restriction on the right to property, hunting is not an inherent or implied limitation of the right to property in Germany. While property ownership entails social obligations (*Sozialpflichtigkeit des Eigentums*), that is not the case with the transfer of landowners' hunting rights to third parties. In view of the political decision taken by the German constitutional legislature in 2006, property owners are not necessarily bound by the restrictions arising out of the hunting legislation. The door is thus open to conclude that no such social obligation should be imposed on landowners against their will.

Thirdly, unlike in France, the law in Germany provided for compensation for landowners whose lands were used by third parties for the purpose of hunting. This argument was invoked by the Federal Constitutional Court and the Federal Administrative Court, which referred to the applicant's right to participate in the decision-making process as a member of the hunting association (*Mitwirkungsrechten des Beschwerdeführers in der Jagdgenossenschaft*) and his right to share in the profits from the use of the land (*Teilhaberecht am Pachterlös*) as justifying the property restriction[57]. But neither of these rights can be seen as sufficient and adequate compensation for the restriction of the right to property. In view of the insignificant amounts provided for by German law, it cannot reasonably be considered that proper compensation was afforded[58]. Moreover, conscientious objectors cannot be compensated by means of profits earned from the activity to which they object or by the exercise of procedural rights with regard to that activity. To pretend otherwise, on the basis of an allegedly "objective" view (*objektive Sicht*) of the landowner's rights[59], would amount to the annihilation of conscientious objection itself. An

[57] See the Federal Constitutional Court judgment of 13 December 2006, paragraph 22, and the Federal Administrative Court judgment of 14 April 2005, paragraph 20.

[58] The same happened in Luxembourg, where a mere 3.25 euros per year was afforded to each landowner (see *Schneider*, cited above, § 49).

[59] As the Federal Constitutional Court did in its judgment of 13 December 2006, paragraph 22.

individual's conscience does not have a price. Hence, the applicant's conscience, like that of any other person of honour, cannot be bought.

The conclusion is unavoidable: there are no sound arguments for distinguishing the *Chassagnou* precedent from the instant case. Therefore, the *Chassagnou* precedent is valid with regard to the German hunting legislation as well. The disproportionate nature of the restrictions imposed on the right to property is compounded by the fact that less intrusive alternatives to the German system of compulsory membership of hunting associations for landowners and the obligation to tolerate hunting are available in many other European countries, with no negative effects on the natural environment being recorded or known. Although the Federal Constitutional Court considered alternative, less restrictive solutions which could better accommodate the competing interests, such as the suspension of hunting on some plots of land or the creation of voluntary hunting associations, it concluded that they were "not as effective for attaining the legislature's aims" (*nicht gleich effektiv zur Erreichung der gesetzgeberischen Ziele*) and that these alternatives would probably entail "considerably more regulation and supervision by the State" (*eines voraussichtlich erheblich höheren Regelungs-und Überwachungsaufwands durch den Staat*). These speculative arguments do not justify the general, blanket and absolute rule of compulsory membership of hunting associations for landowners, established by the German legislature.

In view of the force of the applicable precedent of *Chassagnou* and the aforementioned compounding circumstances, I conclude that there has been a violation of Article 1 of Protocol No. 1.

**Discrimination against owners of small plots**

In *Chassagnou*, the Court went even further and found a breach of Article 14 in conjunction with Article 1 of Protocol No. 1. The argument was the following: "The Court fails to see what could explain the fact that, in one and the same municipality, large landowners may keep for themselves exclusive hunting rights over their land, particularly with a view to deriving income from them, and are exempted from the obligation to transfer these rights to the community or, not hunting there themselves, may prohibit hunting by others on their land, whereas small landowners, on the contrary, are obliged to transfer the rights over their land to an ACCA"[60]. The principle stated by the Court is that no difference of treatment should be allowed between large and small landowners with regard to the way they use their property. Although the German law provides for a general duty to

[60] See *Chassagnou and Others*, cited above, § 92.

hunt on small as well as large plots of land, the fact is that an unjustified difference of treatment remains. Unlike the owners of small plots (75 hectares or less), who cannot avoid having strangers coming on to their property to hunt, the owners of large plots (of more than 75 hectares) do not have a similar obligation, because they themselves can hunt or can choose the persons who will hunt on their property. There is no objective reason for the owners of small plots to have to tolerate the presence of strangers on their property while the owners of large plots do not have to tolerate it. The Government argue that the discrimination is justified by the need to pool small plots together, allegedly in order to allow "proper" game management. But this only explains why small plots have to be pooled together, not why owners of large plots do not have a duty to allow third parties on to their property to hunt.

The words of Justice Clarence Thomas during his confirmation hearings, on his willingness to change precedent, echo in my memory. I too think that overruling a case is a "very serious matter". A judge who wants to overrule a case has the burden of demonstrating not only that the case is incorrect, but that it would be appropriate to take that additional step of overruling it. That is not the case with *Chassagnou*. I therefore find that, as in *Chassagnou*, there has in the present case been a violation of Article 14 in conjunction with Article 1 of Protocol No. 1.

# JOINT DISSENTING OPINION OF JUDGES DAVID THÓR BJÖRGVINSSON, VUČINIĆ AND NUSSBERGER

The case *Herrmann v. Germany* was referred to the Grand Chamber for clarification of the Court's case-law. The Grand Chamber was called upon to interpret the scope of its own jurisprudence and to decide whether the particular features of the German legislation justified a different approach from the one taken in the previous judgments in *Chassagnou v. France* and *Schneider v. Luxembourg*.

We regret that we are unable to agree with the decision of the majority, either in respect of the analysis of the existing case-law or in respect of the assessment of the differences between the respective national regulations.

It is necessary to take into account the fact that the Grand Chamber judgment of the Court in the case *Chassagnou v. France* and the Chamber judgment in *Schneider v. Luxembourg* are not identical. On the contrary, the Chamber, in *Schneider*, went far beyond the findings of the majority in *Chassagnou* in three very important respects.

Firstly, in *Chassagnou*, one of the decisive arguments in assessing the proportionality of the regulations was that they were applied only on a selective basis:

> "In other words, the need to pool land for hunting applies only to a limited number of private landowners, whose opinions are not taken into consideration in any way whatsoever. What is more, the establishment of ACCAs is compulsory in only 29 of the 93 *départements* in metropolitan France where the Law applies, and out of some 36,200 municipalities in France only 851 have chosen to set up associations on a voluntary basis .... Lastly, the Court notes that any landowner possessing more than 20 hectares (60 in Creuse) or an entirely enclosed property may object to membership of an ACCA."

In Luxembourg, on the contrary, the hunting law was in principle applied nationwide, with only private property owned by the Crown being exempted.

Secondly, in Luxembourg the landowners had the possibility in principle of opposing the inclusion of their land in a hunting district, as the decision-making process was based on a democratic process. This was not the case in France.

Thirdly, unlike in France, landowners in Luxembourg were entitled to compensation, albeit a very small amount.

These factors are of great importance in deciding whether a fair balance was achieved in the particular case.

We do not endorse the approach taken by the Chamber for the following reasons.

In our view the regulation of hunting is not a human rights issue *per se*, but rather an issue as to how to achieve an ecological balance between man and nature in a given environment. Nevertheless, whatever regulations on hunting are adopted they are liable to encroach on the rights of landowners on the one hand and the rights of hunters on the other. Therefore, the Court may be called upon – as in the case of *Chassagnou v. France* – to assess the hunting legislation in the light of its compatibility with the human rights guaranteed in the Convention. But the Court is not well equipped to decide on the "necessity" of the corresponding restrictions of rights, as the approach to the question of how to achieve an ecological balance is guided first and foremost by science (see the applicant's statement in paragraph 48) and by experience. Therefore, in *Chassagnou*, the Court did not enter into the general debate, but based its view on the selective nature of the human rights restrictions characterising the French system, which could not be justified by any reasonable argument. In our view this very specific line of argument could not be transposed to the situation in *Schneider v. Luxembourg*, where the only exception to the otherwise comprehensive application of the hunting law related to the privileges of the Crown.

Furthermore, while it is acceptable to argue – as was done in *Chassagnou* – that the right to participate in the hunt could not be regarded as compensation for the infringement of the property rights of an individual who was opposed to hunting, the argument in *Schneider* that financial compensation would be irreconcilable with ethical motives was not in line with the Court's case-law on Article 1 of Protocol No. 1. Financial compensation does matter, be it in an expropriation case or in a case concerning restriction of the use of property. The structure of the right to property is fundamentally different from that of the right to freedom of thought, conscience and religion which is protected under Article 9 of the Convention. The judgment in *Schneider* confused the two human rights guarantees although they are very different in their protective approach. Infringements of property rights can be "paid off", the others not. There is no reason why restrictions on property rights should be made dependent on the property owners' convictions. The consequence would be that the convictions of property owners would be given precedence and would enjoy dual protection, under both Article 9 (if applicable) and Article 1 of Protocol No. 1, whereas "normal convictions" would be protected only by Article 9. The case of *Schneider v. Luxembourg* should have been argued (and dismissed) under Article 9 and the issues of conscience should not have been raised under Article 1 of Protocol No. 1.

For all these reasons we are of the view that the Grand Chamber should not have followed the approach developed by the Chamber in *Schneider*, but should have favoured a narrow interpretation of the case-law on human rights issues arising out of the legislation on hunting, as originally developed in *Chassagnou*.

On the basis of a narrow interpretation of the judgment in *Chassagnou*, it is clear that the regulations laid down by the German hunting legislation differ substantially from those criticised by the Grand Chamber in *Chassagnou*. The German law does not regulate a leisure activity, but deals with the general management of game stocks, combines rights and duties, includes the landowners in a self-managing decision-making body and allows them to claim a share of the profits, compensation for damage and insurance payments. It is applied comprehensively throughout the country without providing for any personal exemptions. The reform of the federal system has not altered the nationwide application of the relevant regulations. We therefore believe that the arguments advanced in the Chamber judgment of the Fifth Section on 20 January 2011 are pertinent and convincing (see §§ 45-56 of the Chamber judgment).

Moreover, the situation in the specific case has to be taken into account. While it is true that human rights protection has to be practical and effective and not theoretical or illusory, it is also true that the Court should take into account whether there is a real or only a theoretical human rights problem. In the case at hand the applicant inherited the land from his mother in 1993 and has *de iure* been a member of a hunting association since then. Nevertheless, he complained about a human rights violation only in 2003, that is to say ten years later, allegedly – as his lawyer stated at the hearing – because he had been unaware of the fact that he was a member of a hunting association. In real human rights cases applicants know (and feel) that their rights are being violated. Furthermore, the applicant did not have any knowledge about the use of his land, being unaware that animals were being raised there for slaughter. There are no indications of any damage to his property or any other visible or tangible problems caused by the application of the legislation in force. Likewise, he never tried to influence the other members of the hunting association, although he claimed that the latter had some discretion, for instance to reduce the range of species to be hunted (see paragraph 97 of the judgment). Finally, he did not allege that he had ever witnessed a hunt on his property.

All in all, the Court has allowed itself to be drawn unnecessarily into the micromanagement of problems which do not need a solution at European level and would be better solved by national Parliaments and the national hunting authorities. In our view this is an excellent example of a case in which the principle of subsidiarity should be taken very seriously.