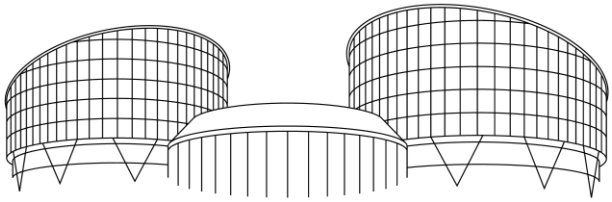

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF KLAUS AND YURI KILADZE V. GEORGIA

(Application no. 7975/06)

JUDGMENT

STRASBOURG

2 February 2010

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

In the case of Klaus and Yuri Kiladze v. Georgia,

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

Françoise Tulkens, *President*,
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
András Sajó,
Nona Tsotsoria,
Işıl Karakaş, *judges*,
and Ms Sally Dollé, *Section Registrar*,

Having deliberated in private on 15 December 2009,

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

PROCEDURE

1. The case originated in an application (no. 7975/06) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention') by Georgian nationals, Mr. Klaus Kiladze Mr. Yuri Kiladze ('the applicants'), on 22 February 2006.

2. The applicants were represented by Ms. Sophio Japaridze, an advocate of the Georgia Young Lawyers' Association ('GYLA') as well as by Mr. Philip Leach and Mr. Bill Bowring, advocates of the European Human Rights Advocacy Centre in London ('EHRAC'). The Government of Georgia ('the Government') were represented by their agent, Mr. Besarion Bokhashvili.

3. The applicants allege, in particular, that they have not been able to assert their rights to compensation resulting from their status as victims of political repression.

4. On 21 March 2006, the Court decided to give priority to the application (Article 41 of the Rules of Court) and, on 6 July 2006, it decided to communicate the complaints based on Article 1 of Protocol no. 1 and Article 13 of the Convention to the Government (Article 54 § 2 b) of the Rules of Court). As permitted under Article 29 § 3 of the Convention, the Court also decided that the admissibility and merits of the case would be examined at the same time.

5. Both the applicants and the Government filed their written observations (Article 54A of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants, two brothers, were born in 1926 and 1928 respectively and are resident in Tbilisi.

7. Having been tried on 2 October 1937 for sabotage and terror, the father of the applicants was shot.

8. On 7 November 1938, the mother of the applicants was condemned to eight years imprisonment for propaganda and agitation consisting of a call for the overthrow of the Soviet regime and was deported to a GULAG (*Generalnoye Upravleniye Lagerey*) camp in the extreme north of the USSR.

9. Then aged 12 and 10 respectively, the applicants at first remained alone in their parents' apartment in Tbilisi, with no neighbours, friends or family daring to go near them for fear of being arrested. They were then held for one and a half months at a detention centre in Tbilisi. Being malnourished, they subsequently contracted typhoid due to unhygienic conditions. They were then sent away from Georgia to the Stavropol region of Russia, and placed, in accordance with the Order of the People's Commissar for Internal Affairs of the USSR of 15 August 1937 ('the Order of 15 August 1937'), in a children's home and were there for two years. Subjected to a 'test of socio-political affinity', both the applicants were constantly humiliated and beaten by the staff for being the children of their father, the 'traitor of the Motherland', and by the other orphan children for being natives of Georgia, Stalin's country of origin. They were also kept in deplorable conditions. 60 children slept together in the same room on a long mat, and a quilt had to be shared by five children. A wooden barrel kept in the same room served as the toilet ('*paracha*') and there was no running water. The applicants had lice and caught scabies.

10. Immediately after the arrest of the applicants' mother, the family apartment of 90 m² in Tbilisi was confiscated together with all the furniture and personal and family items.

11. In 1940, the grandmother of the applicants managed to obtain custody. Having been returned to Georgia, while still children, the applicants were forced to go into physical labour in order to earn a living. Subsequently, for the whole of their working life under the USSR, they had to face strong social and political pressure as the children of a 'traitor of the Motherland'.

12. In 1945, the applicants' mother was freed. She returned to Tbilisi suffering from scurvy (then aged 42, she no longer had any teeth), pleurisy and gastroenteritis. On 4 May 1956, the South Caucasus Military Court annulled the decision of 7 November 1938 condemning the applicants'

mother due to the absence of an offence and pronounced her rehabilitation. On 30 August 1957, the panel on military affairs of the Supreme Court of the USSR annulled the decision of 2 October 1937 for the same reasons and pronounced the rehabilitation of their father.

13. On 16 March 1991, the applicants' mother died.

14. On 6 March 1998, the applicants wrote to the Georgian Ministry of State Security asking for information concerning the criminal proceedings against their parents, the confiscation of their property and their own stay at the orphanage. On 1 July 1998 they received the reply that no information had been retained concerning their stay at the orphanage. As far as information on their parents was concerned, the ministry's archives had been destroyed in a fire during the civil war of 1991-1992. They were advised to collect a number of eye-witness statements, to have them certified by a notary and to apply to the court of jurisdiction in their place of residence requesting the establishment of a legal fact.

15. On 16 March 1998, the applicants applied to the court of first instance in Sabourthalo in Tbilisi requesting that their parents, as well as they themselves, be declared victims of political repression.

16. On 19 August 1998, their request was granted in full.

17. On the grounds of this decision, which became final on 2 September 1998, the applicants applied on 15 March 2005 to the Tbilisi Regional Court with an action for compensation for material and moral damages based on Article 9 of the Law of 11 December 1997 on the Recognition of Status as a Victim of Political Repression for Georgian Citizens and Social Protection for the Oppressed ('the law of 11 December 1997'), which entered into force on 1 January 1998. Emphasising the killing of their father, the separation from their mother, their conditions of detention first at the detention centre then at the orphanage, the damage caused to their health, the humiliation and repression suffered from the time of their parents' arrest to an elderly age, as well as the confiscation of possessions following their mother's arrest, the applicants asked, by virtue of the abovementioned Article 9, to be granted compensation of 515,000 Georgian laris (approximately 208,000 euros[1]) each for the total material and moral damages which they suffered.

18. The representative of the Georgian President, the defending party, maintained that the applicants' action should not be admitted, given that they had not been recognised as having any right to compensation prior to 1997 and that 'the law' referred to in the law of 11 December 1997 had not yet been adopted.

19. On 9 June 2005, the Tbilisi Regional Court considered the facts relating to the applicants' past outlined above to be established, save for the confiscation of possessions. On the latter point, the regional court cited

[1] Conversion rate of 22 September 2009.

against the applicants on the grounds of Article 102 § 3 of the Civil Procedure Code a lack of documentary proof attesting to the confiscation, judging that the written statements of eye-witnesses that they had submitted were not sufficient. They also considered the applicants' action to be beyond the period of limitation altogether, without indicating what period of limitation applied and from when this period had commenced. Finally, the regional court concluded that the request of the applicants could not be admitted in any event since the 'laws' to which Articles 8 and 9 of the law of 11 December 1997 referred had not yet been adopted.

20. The applicants brought a cassation appeal submitting that, by virtue of the Order of 15 August 1937 (see paragraph 26 below), the wife of any person condemned as a 'traitor of the Motherland' would themselves automatically be condemned to a term of imprisonment of five to eight years, that their minor children would then be placed in children's homes outside of the Georgian territory and that movable and immovable possessions would automatically be confiscated. The condemning of their father obligatorily led to these measures and, given the context in which these events took place, they could not be blamed for the fact that they were unable to present documentary proof of the confiscation of property. As to the period of limitation, the applicants submitted that their action for compensation was based on the law of 11 December 1997 and could not therefore be beyond the period of limitation at the time when their requests were decided. In any event, they believed that they were entitled to compensation by virtue of Article 1005 § 3 of the Civil Code. The applicants also alleged that around eight years had passed since the law of 11 December had entered into force in which the State had not taken the necessary measures in order to legislate and compensate the victims of political oppression in accordance with Articles 8 § 3 and 9 of this law. They maintained that the number of these victims, all elderly, was falling, and in their opinion, the State was waiting for their death to resolve the problem of compensating them. According to the note of explanation in a draft of the law which a non-governmental organisation submitted, in vain, to the Parliament in 2001 to remedy the legal void in question, the number of victims of political repression affected by the abovementioned Article 9 varied, according to the categories, from 600 to 16,000.

21. The applicants' appeal was dismissed on 2 November 2005 by the Supreme Court of Georgia which, upholding the reasoning of the regional court relating to insufficient documentary proof of the confiscation of possessions, dismissed their request for compensation for material damages. As for moral compensation, the Supreme Court considered the facts relating to their repression outlined in paragraphs 7-9 and 11 above to be established. It secondly believed that 'the law' mentioned in Article 413 § 1 of the Civil Code was, in this case, Article 9 of the law of 11 December 1997, *lex specialis* for the purposes of the case. It concluded that in the

meaning of the abovementioned Article 9, the notion of 'pecuniary compensation' included, among other things, moral compensation. However, given that no regulatory act relating to the payment of the compensation in question, as referred to in Article 9, had been adopted, the applicants' request for moral compensation was, at the given time, without grounds and could not be admitted. It does not seem that the Supreme Court echoed the reasoning of the regional court concerning the period of limitation on the applicants' action.

22. The applicants continued to seek proof of the confiscation of their parents' possessions. In a letter of 4 December 2006, the Registry of Real Estate Property informed them that the apartment in question had only appeared in the archives for the first time in 1940, as a property of the State. Since then, no information has become available on the subject.

II. RELEVANT DOMESTIC LAW

23. *Civil Code*

Article 147

'Property, according to this Code, is every thing, as well as any intangible property benefit, which may be possessed, used and disposed of by natural and legal persons, and which may be acquired without restriction, unless this is prohibited by law or contravenes moral standards.'

Article 152

'Claims and rights that may be transferred to other persons, or that are intended either for bringing a material benefit to their possessor, or for entitling the latter to claim something from other persons, constitute intangible property.'

Article 413 § 1

'Monetary compensation for non-property damages may be claimed only in the cases precisely prescribed by law, in the form of a reasonable and fair compensation.'

Article 1005 § 3

'The harm caused by illegal conviction of a rehabilitated person; illegal criminal prosecution; illegal application of enforcement measures in the form of detention or an order not to leave a place; or improper imposition […] shall be compensated by the state regardless of the fault of officials of inquiry or preliminary investigation agencies, the procurator's office or the court. In the case of intentional misconduct or gross negligence, these persons and the state shall be liable jointly.'

24. *Civil Procedure Code*

Article 102 § 3

'The circumstances of a case which must be established with proof of a certain type according the law cannot be established with proof of another type.'

25. *Law of 11 December 1997 on the Recognition of Status as a Victim of Political Repression for Georgian Citizens and Social Protection for the Oppressed*

Title I – General provisions

Article 1 § 2

'This law shall apply to Georgian citizens who were subjected to political repression on the territory of the former USSR between the month of February 1921 and 28 October 1990 […]'

Title II – Rules for the recognition of status as a victim of political repression and its consequences

Article 6

'On the grounds of the criteria defined in this law, a person shall be recognised as a victim of political repression and their rights which have been violated shall have legal redress.'

Article 8 §§ 1 and 3

'A person recognised with the status of a victim of political repression shall be have their political, civil and other rights and freedoms, which have not been recognised following political repression, re-established […].

The rules for the restoration of rights to possessions of the rehabilitated person shall be determined in a separate law.'

Article 9

'A person who has suffered repression in the form of placement in a place of detention, exile, […], a special place of residence or in a psychiatric establishment, or who died following such repression, and who has been recognised as a victim of political repression, as well as their first generation heirs, may receive pecuniary compensation, of which the amount and rules of payment shall be defined in law.'

Title III – Social protection for victims of political repression

In accordance with Article 12 §§ 1 and 2, the victims of political repression or, in the case of death, their first generation descendants shall receive a monthly pension of which the amount and terms of allocation shall be defined in law, they shall be exonerated from paying for various charges and shall benefit from reduced gas, electricity and telephone tariffs.

Title V – Final provisions

Article 14

'This law shall enter into force on 1 January 1998.'

Neither the transitional provisions nor any other provision of this law indicates a period in which the laws envisaged in Articles 8 § 3 and 9 above must be adopted. These laws are still lacking to this day.

26. *Order of the People's Commissar for Internal Affairs of the USSR of 15 August 1937 (relevant extracts)*

'Following the receipt of this order, begin the repression of the wives of traitors of the Motherland and the members of right-wing Trotskyite spy-diversionary organisations convicted […] from 1 August 1936 onwards. Abide by the following rules in conducting this operation: […]

3. Those designated for repression shall be arrested. […]

7. All possessions belonging to the arrested person […] shall be confiscated. The apartments shall be sealed.

8. The arrested women shall be escorted to prison. The children shall be removed at the same time […].

12. The wives of the convicted traitors of the Motherland shall be detained in camps for terms of no less than 5-8 years, depending on their degree of danger to society. […]

19. All the orphan children must be placed in children's homes outside of the territory concerned […].

24. Every town involved in this operation shall be specially provided with detention centres where the children will be taken immediately after the arrest of their mothers and from where they will be sent on to children's homes […]'

AS TO THE LAW

I. ON THE ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

27. The applicants allege that in delaying in giving substance to their rights guaranteed under Articles 8 and 9 of the law of 11 December 1997, the State was keeping them in a tormenting situation of uncertainty and distress which amounted to degrading treatment.

28. Article 3 of the Convention reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

29. While it does not deny that the uncertainty in question is of a nature which presents aspects which the applicants could regard as distressing or unjust, the Court does not however believe that this conveys contempt or a lack of respect on the part of the State towards the person of the applicants or that it intends to humiliate or belittle them (see, among others, *D. H. and others v. Czech Republic* (dec.), no. 57325/00, 1 March 2005 ; *Raninen v.* Finland, judgment of 16 December 1997, *Anthology of Judgments and Decisions* 1997-VIII, § 55). The denounced situation is therefore not considered, in the eyes of the Court, to be degrading treatment in the meaning of Article 3 of the Convention.

30. This part of the application is therefore clearly unfounded and must be dismissed in accordance with Article 35 §§ 3 and 4 of the Convention.

II. ON THE ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 AND ARTICLE 13 OF THE CONVENTION

31. The applicants believe that the failure to adopt the laws referred to in Articles 8 and 9 of the law of 11 December 1997 when they are necessary in order to bring their right recognised under these provisions into effect, is a violation of their rights under Article 1 of Protocol no. 1 which is worded 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."

32. The applicants moreover believe that the domestic courts, which decided to dismiss their appeal due to the abovementioned legislative void, had not offered an effective remedy in the meaning of Article 13 of the Convention, which reads as follows:

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

A. As to Admissibility

1. Objection of the Government based on incompatibility ratione temporis

a) Arguments of the Government

33. The Government believes that the examination by the Court of the legal proceedings in question, which it believes to be firmly linked to facts which occurred prior to the Convention and Protocol no. 1 coming into effect regarding Georgia, on 20 May 1999 and 7 June 2002 respectively, will result in the retroactive effect of these instruments (*Stamoulakatos v. Greece (no. 1)*, judgment of 26 October 1993, series A no. 271, p. 14 § 33; *Multiplex v. Croatia* (dec.), no. 58112/00, 26 September 2002).

34. Furthermore in this case, according to the Government, there is no 'continuous situation' and there are 'substantial differences and a large number of factors' which differ the present application from the case of *Almeida Garrett, Mascarenhas Falcão and others v. Portugal* (nos. 29813/96 and 30229/96, ECHR 2000-I).

35. Firstly, the applicants were not trying to prove that they had been owners of a possession more than some 60 years earlier and were the subject of expropriation. The Government submits that the applicants were recognised as victims of political repression solely due to their parents convictions, the detention of their mother as well as their own detention and exile, in accordance with Article 9 of the law of 11 December 1997. The State therefore has no obligation, unlike in the aforementioned case of *Almeida Garrett and others*, to pay them any reparation for damages for the alleged expropriation. The applicants were awarded the right to compensation by virtue of the aforementioned Article 9 five years prior to 7 June 2002, moreover, subject to the adoption of a subsequent law defining the rules and terms of its application.

36. Secondly, contrary to the aforementioned case of *Almeida Garret and others*, the Georgian executive and legislative authorities have not, since 7 June 2002, adopted any law concerning the issue of the compensation in question (see, *a contrario*, *Almeida Garrett and others*, cited above, § 43), because such a law would have had important political and economic consequences. Finally, only a few years passed between 7 June 2002 and the communication of the present application to the Government, while, in the aforementioned Portuguese case, the period between the ratification of Protocol no. 1 by Portugal and the examination of the case by the Court was more than 20 years.

37. Under these conditions, the Government asks the Court to follow the same reasoning as in the case of *Aćimović* (*Aćimović v. Croatia* (dec.), no. 61237/00, 7 November 2002) to declare the present application inadmissible due to incompatibility *ratione temporis* with the provisions of the Convention.

b) Arguments of the Applicants

38. The applicants reply that their complaint is not regarding the facts of the repression, exile and arbitrary expropriation which took place under the Soviet regime, but the fact that until this day, the Georgian State has failed to define the rules of compensation in order to give substance to their right to guaranteed compensation under Articles 8 and 9 of the law of 11 December 1997.

39. The applicants believe that their application is similar to the case of *Broniowski* (*Broniowski v. Poland* [GC], no. 31443/96, ECHR 2004-V). Furthermore, contrary to the Government, they do not consider it to be different to the aforementioned case of *Almeida Garret and others*. According to the applicants, they cannot be rebuked for failing to submit documentary proof of the loss of possessions, given that the arrest and exile of their mother led, obligatorily, by virtue of the Order of 15 August 1937, to the confiscation of the possessions in their entirety. In their opinion, this Order and the statements of the eye witnesses should have been accepted by the national judges as sufficient proof. The demand to submit documents attesting to the confiscation of possessions would have imposed an excessive burden of proof upon them. If it is all the same necessary to differentiate their situation from that of *Almeida Garret and others*, the applicants submit that, in this case, the Portuguese State had, at least, granted provisional compensation to the applicants (*Almeida Garret and others*, as above, §§ 9 and 23).

40. Nevertheless, whatever the arguments of the Government and domestic courts concerning the confiscation of possessions, the applicants submit that by virtue of Article 9 of the law of 11 December 1997, they are entitled to receive compensation on more general grounds, due to the moral damages suffered due to the exile and arbitrary detention. Moreover, the Supreme Court has confirmed, in the *obiter dictum* of its judgment, the existence of this right.

41. To conclude, the applicants stress that they are calling into question the grounds of the domestic courts in dismissing their action, which are solely based on the lack of the 'law' envisaged in Article 9 of the law of 11 December 1997, this lack being the result of the State's failure to act. Contrary to the Government, they do not believe that the period since 7 June 2002 is not sufficiently long to unjustly expose them to an uncertainty.

c) Assessment of the Court

42. The Court notes that it has not been called upon to examine questions relating to the confiscation of the possessions of the applicants' parents which took place in 1937 in accordance with the Order of the People's Commissar for Internal Affairs of the USSR (see paragraphs 38 above and 50 below). The subject of the present application consists of determining if, by virtue of Articles 8 § 3 (restoration of rights of possession) and 9 (moral damages resulting from detention or exile) of the law of 11 December 1997, the applicants, as the children of persecuted parents, and themselves victims of political repression, benefit from rights to possessions, and, if these rights exist, they have been respected.

43. The Court observes in this regard that the law of 11 December 1997 entered in force on 1 January 1998. Since then, as the Government confirms, no law with regard to Articles 8 § 3 and 9 has been adopted. This lack of any legislative measure subsequent to 7 June 2002, the date on which Protocol no. 1 entered into force regarding Georgia, cannot give an 'instantaneous' nature to the law of 11 December 1997 in the meaning of Article 1 of Protocol no. 1 (see, for example, *Blečić v. Croatia* [GC], no. 59532/00, § 86, ECHR 2006-III). For the Court, the rights which were awarded to the applicants by virtue of Articles 8 § 3 and 9 of this law prior to the ratification of Protocol no. 1 were still in effect at the time of the ratification as well as on 22 February 2006, the date on which the parties submitted their application to the Court (*Broniowski*, cited above, § 125 ; *von Maltzan and others v. Germany* (dec.) [GC] nos. 71916/01, 71917/01 and 10260/02, § 74 d) *in fine*, ECHR 2005-V; *Beshiri and others v. Albania*, no. 7352/03, § 82, 22 August 2006). Consequently, the Court can appreciate, from the point of view of Article 1 of Protocol no. 1, the continued failure to legislate which lasted well beyond 7 June 2002, and which the applicants continue to face. While it is true that it does not have jurisdiction *ratione temporis* in respect of the part of this situation prior to 7 June 2002, the Court has nevertheless to take this period into account within the framework of the complaints which are being addressed (see, among others, *Broniowski v. Poland* (dec.) [GC], no. 31443/96, §§ 74-77, ECHR 2002-X ; *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 58, ECHR 2002-VII).

44. Due to the above considerations, the Court cannot follow in this case the same reasoning as in the cases cited in paragraphs 33 and 37 above. The objection of the Government based on the Court's lack of jurisdiction *ratione temporis* must accordingly be dismissed.

2. Objection of the Government based on incompatibility ratione materiae

a) Arguments of the Government

45. First of all, the Government asks the Court to take into account the fact that the new independent Georgian State adopted the law of 11 December 1997 as an act of recognition and condemnation of the atrocities committed by the USSR regime. In its opinion, the current Georgian State cannot be held responsible for these atrocities and commanded to compensate the applicants for damages suffered in 1937-1938. The Government wonders whether the applicants would have been more satisfied if the Georgian State had not recognised, pending economic development in the country, that they had been victims of a former regime.

46. For the Government, given that the laws envisaged in Articles 8 § 3 and 9 of the law of 11 December 1997 have not been adopted, the right of the applicants to compensation does not constitute a sufficiently established right to possession in the meaning of Article 1 of Protocol no. 1. In its opinion, the aforementioned Article 9 only 'simply recognises victim status' of the applicants and 'implicitly' stipulates that a subsequent law necessary to bring their right to compensation into effect will only be adopted when the State is ready to support the corresponding financial burden. This should allow the Court to conclude that the relation of proportionality was not disrupted in this case.

47. As regards a lack of perspective concerning the date of the adoption of the laws in question, it does not, according to the Government, constitute a violation of the rights of the applicants in so far as this derives from the, quite large, discretionary powers which the Contracting Parties benefit from in this matter.

48. In conclusion, given the lack of existence of the laws envisaged in Articles 8 § 3 and 9 of the law of 11 December 1997 and the refusal of the domestic courts to allow the applicants' action, the right to compensation which they are invoking before the Court does not constitute, according to the Government, a definite, real and applicable right (*Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, series A no. 301-B, §§ 59-61 ; *Burdov v. Russia*, no. 59498/00, § 40, ECHR 2002-III). The application would consequently be incompatible *ratione materiae* with the provisions of the Convention.

b) Arguments of the Applicants

49. The applicants believe that the right to compensation guaranteed by a law constitutes a 'possession' in another aspect of the notion of Article 1 of Protocol no. 1 (*Pressos Compania Naviera S.A. and others v. Belgium*, judgment of 20 November 1995, series A no. 332, § 31; *Kopecký v.*

Slovakia [GC], no. 44912/98, § 47, ECHR 2004-IX; *Broniowski*, cited above, §§ 125, 133 and 146). Moreover, such a right, since it is guaranteed by the law, constitutes their property in accordance with Article 147 and 152 of the Civil Code.

50. The applicants maintain that they are not seeking to have the current Georgian State declared responsible for the atrocities committed in their regard under the communist regime. However, they do not believe that the law of 11 December 1997 is simply a declaration of good will solely to recognise their victim status. On the contrary, this law awarded them a certain number of concrete and defendable rights many of which, for that matter, have been respected. For example, by virtue of Article 12 of the law in question, the applicants have received monthly, since 1998, a pension of around 23 euros each and benefit from other measures of social assistance. Producing the corresponding proofs of payment, the applicants do not believe that the State is paying them this monthly pension by virtue of a simple declaration of good will.

51. The applicants oppose the Government's argument that Article 9 of the law of 11 December 1997 implicitly stipulates that it will only acquire effective force when the subsequent law is adopted. They moreover submit that reasons based on a lack of financial resources do not justify the failure to respect a legal obligation (*Burdov*, cited above, § 35). According to the applicants, the financial resources exist, but the political will is lacking.

52. Finally, the applicants stress that contrary to Article 8 § 3 of the law of 11 December 1997, according to which the rules on the restoration of possessions 'will be determined by a separate law', Article 9 of the same law is mandatory regarding the existence of the right, for which only the terms of exercising it need to be defined.

c) Assessment of the Court

53. The Court first of all reaffirms that the Convention does not impose any specific obligation on the Contracting States to redress the injustices or damages caused by their predecessors (*Ernewein and others v. Germany* (dec.), no. 14849/08, 12 May 2009). At the same time, Article 1 of Protocol no. 1 does not impose any restrictions on the Contracting States regarding their freedom to choose the conditions in which they will accept the restoration of a proprietary right to dispossessed persons or determine the terms according to which they will accept paying reparations or compensation to the persons concerned (*von Maltzan and others*, decision cited above, § 77).

54. In the present case, the Court believes that it is incumbent upon it to determine if the right to restore rights to possessions (Article 8 § 3 of the law of 11 December 1997), on the one hand, and the right to compensation for moral damages (Article 9 of the same law), on the other hand, are sufficiently established in domestic law to award the applicants the right to

'possessions' in the sense of Article 1 of Protocol no. 1 and to therefore appeal for the protection of this provision. It should be recalled in this regard that, according to the established case law in the matter, the notion of 'possessions' can cover financial assets as much as 'existing possessions', including debts by virtue of which an applicant may claim to have at least a 'legitimate hope' to obtain effective enjoyment of a proprietary right (*Malhous v. Czech Republic*, (dec.) [GC], no. 33071/96, 13 December 2000 ; *Pine Valley Developments Ltd and others v. Ireland*, 29 November 1991, § 51, series A no. 222).

i) Right to restore rights to possessions (Article 8 § 3 of the law of 11 December 1997)

55. The Court notes that as the children of victims of political repression of the 1930s, who have also themselves been declared as victims of this by a court, the applicants applied to the domestic courts with an action for material and moral compensation based on Article 9 of the law of 11 December 1997 (see paragraph 17 above). Also, even though they enclosed in their claims demands relating to the damages caused by the loss of possessions which belonged to their mother (their father being deceased at the time of confiscation), the applicants did not initially make specific reference to Article 8 § 3 of the abovementioned law in order to assert their right 'to the restoration of possessions'. However, given that both the regional court and the Supreme Court of Georgia examined, in the presence of the parties, the question of the right of the applicants resulting from Article 8 § 3, without the latter being opposed, it can be considered that the applicants were intending in effect to also obtain pecuniary compensation in accordance with this provision.

56. In view of the documents of the case and the position of the applicants before the domestic courts, the Court notes that in asserting their rights relating to possessions, the applicants did not seek the return of the movable and immovable property confiscated from their mother. In any event, such a hope to recover a long extinguished property right cannot be considered a 'possession' in the sense of Article 1 of Protocol no. 1 (*Gratzinger and Gratzingerova v. Czech Republic* (dec.) [GC], no. 39794/98, § 69 *in fine*, ECHR 2002-VII). In fact, the objective of the applicants consisted of receiving compensation for the damages resulting from the aforementioned measure of confiscation (see *Sokolowski v. Poland* (dec.), no. 39590/04, 7 July 2009).

57. In reading Article 8 § 3 of the law of 11 December 1997, the Court notes that a 'separate law' was judged necessary by the legislator in order to determine the actual rules on the restoration of rights of the restoration of rights to possessions of the victims of political repression. The applicants themselves concede to the Court that, contrary to Article 9 of the same law relating to moral damages, Article 8 § 3 in question is not so 'imperative'

regarding the existence of the right which it sets out (see paragraph 52 above).

58. In effect the provision of Article 8 § 3 of the law of 11 December 1997 does not on its own allow for understanding which type of possessions (nationalised, sold in the meantime to third parties – bought in good faith, etc.) will later be considered as liable to result in the 'restoration' of rights ; if this restoration will take the form of return where it is possible, or of the awarding of equivalent possessions or pecuniary compensation; what categories of people will be able to claim these rights (former owners and therefore direct victims, their descendants, etc.) and to what extent; what authority will be charged with identifying the possessions concerned and determining their value, etc. Thus, these criteria, among others, must still be defined and the State has ample discretionary powers to do this (*von Maltzan and others*, decision cited above, §§ 74 d) and 111).

59. Consequently, in the eyes of the Court, it is only the adoption of a subsequent law which will allow the applicants to assess if they are eligible, as first generation descendants of the dispossessed owners, to the restoration of rights envisaged in Article 8 § 3 of the law of 11 December 1997 (see, *mutatis mutandis*, *Gratzinger and Gratzingerova*, decision cited above, §§ 72-75) and if they are, to what extent. Meanwhile, the question of finding out if they will fulfil, when the time comes, the legal conditions in order to benefit from the compensation which they are claiming remains unresolved, which does not allow for the conclusion that at the time of the start of domestic proceedings in 2005 pursuant to the abovementioned Article 8 § 3, there existed in their favour a proprietary interest sufficiently established to be payable (see, *mutatis mutandis*, *Kopecký*, cited above, § 58, ECHR 2004-IX).

60. To conclude, the Court believes that Article 8 § 3 of the law of 11 December 1997, as it has been in force since 1 January 1998, does not in itself result in a real and outstanding debt from which a 'legitimate hope' could arise (see, *a contrario*, *Pressos Compania Naviera S.A. and others*, cited above, § 31).

61. This point of the complaint based on Article 1 of Protocol no. 1 is therefore incompatible *ratione materiae* with the provisions of the Convention and must be dismissed accordance with Article 35 §§ 3 and 4 of the Convention.

62. Given that there is no 'justifiable complaint' as far as this part of the application is concerned, the complaint of the applicants based on Article 13 of the Convention must also be rejected in accordance with Article 35 §§ 3 and 4 of the Convention (see, among others, *Zehnalová and Zehnal v. Czech Republic* (dec.), no. 38621/97, ECHR 2002-V).

ii) Right to compensation for moral damages resulting from detention and exile (Article 9 of the law of 11 December 1997)

63. The Court submits that while the proprietary interest claimed by one applicant is in the nature of a debt, it can only be considered as 'a possession' in the sense of Article 1 of Protocol no. 1 where there is a sufficient basis in domestic law, for example where it is confirmed by well established case law in the courts (see, among others, *Roche v. United Kingdom* [GC], no. 32555/96, § 129, ECHR 2005-X ; *Slavov and others v. Bulgaria* (dec.), no. 20612/02, 2 December 2008).

64. In this case, it follows from reading the law of 11 December 1997 that any Georgian citizen declared a victim of political repression which took place on the territory of the former USSR between February 1921 and October 1990 can receive pecuniary compensation, in accordance with Article 9 of this law, if they prove that they were detained, exiled, placed in a special place of residence or they subsequently died from such a measure. The first generation heirs of such a victim are also awarded this right.

65. The Court notes that the applicants fulfil each of the abovementioned conditions. In effect, they have themselves been declared victims of the aforementioned political repression by a court, and they are furthermore children of oppressed parents for whom victim status for the purposes of the law of 11 December 1997 was also recognised by a court. There was no doubt placed on the fact that the applicants and their parents suffered the acts of repression mentioned in paragraphs 7-9 and 11 above by either the domestic courts or the Court (see paragraph 35 above). On the contrary, these facts were explicitly considered to be established by the Supreme Court of Georgia in its final judgment of 2 November 2005 (see paragraph 21 above).

66. Therefore, the right to moral compensation which the applicants are claiming has a legal basis in domestic law for which they fulfil the conditions of application (see, *a contrario*, *Ernewein and others*, decision cited above, and *Epstein and others v. Belgium* (dec.), no. 9717/05, ECHR 2008-... (extracts) as well as, *mutatis mutandis*, *Jantner v. Slovakia*, no. 39050/97, §§ 29-33, 4 March 2003).

67. Moreover, the fact that the applicants have acquired this right was confirmed by the Supreme Court of Georgia. According to this court, non-moral compensation could be claimed by the applicants in accordance with Article 9 of the law of 11 December 1997 which was, for the purposes of this case, 'the law' envisaged in Article 413 § 1 of the Civil Code, which only allows for the reparation of non-proprietary damages in cases expressly stipulated by the law. The Supreme Court only came to the conclusion to dismiss the applicants' demand for moral compensation due to the absence of laws on application relevant at the 'given time' (see paragraph 21 above). Contrary to the right to restoration of rights to possessions, it does not place any doubt that when these laws are adopted, the applicants will be

necessarily affected and eligible to receive compensation for moral damages in accordance with the abovementioned Article 9. It remains solely to determine, according to the damages suffered by each of the applicants, the 'amount' of this compensation and 'the rules for its payment' in order to put the system in action. For this reason, the Court does not share the opinion of the Government that the right to moral compensation as such will only be deemed to have been acquired by the applicants if the subsequent law anticipated by Article 9 is ultimately adopted (see paragraph 46 above). This interpretation is not that of the highest domestic judicial court in the case and can also not be inferred from the wording of Article 9 in question or from any other provision of the law of 11 December 1997.

68. Taking into account the above, the Court believe that at the time of the start of domestic proceedings, the applicants possessed, by virtue of Article 9 of the law of 11 December 1997, a debt sufficiently established to be payable and which they could validly claim to recover from the State. This allows the conclusion that in this part of their action, Article 1 of Protocol no. 1 is applicable. The objection of the Government based on incompatibility *ratione materiae* cannot therefore be allowed.

69. Consequently, the complaints of the applicants based on Article 1 of Protocol no. 1 and of Article 13 of the Convention as far as their right guaranteed by Article 9 of the law of 11 December 1997 is concerned must be declared admissible.

B. As to the merits

1. Arguments of the Parties

70. The Government did not present any observations on the merits of the complaints. As regards the applicants, they limited themselves to maintaining that the above objections of the Government were unfounded and that there was therefore a violation of their rights guaranteed by Articles 1 of Protocol no. 1 and 13 of the Convention.

2. Assessment of the Court

71. The Court notes that in this case, it is the failure to adopt the necessary laws to determine the amount of the moral compensation and the rules for its payment which poses a restriction on the effective exercising of the law protected by Article 1 of Protocol no. 1. The situation in question also comes the first sentence of the first paragraph of Article 1 of Protocol no. 1 which states, in general, the principle of the respect for possessions (*Broniowski*, cited above, § 136).

72. The Court will work from the principle that, in as far as the omission of the Georgian State is founded in the law of 11 December 1997 which

defers the adoption of the law ultimately envisaged in Article 9 until a later date, the scope of the restriction on the applicants exercising their right in respect of their possessions was, as it were, 'allowed for by the law'. In the opinion of the Court, the nature of this omission and the consequences to which it led from the point of view of compliance with Article 1 of Protocol no. 1 are to be taken into account in determining whether the Georgian authorities achieved a fair balance between the interests at issue (see paragraph 75 below).

73. The Court has to therefore explore whether, for the purposes of the first sentence of the first paragraph of Article 1 of Protocol no. 1, a fair balance was maintained between the demands of the general interest of the community and the imperatives to safeguard the fundamental rights of the individual. In particular, the Court has to verify whether, due to the failure of the State to act which is in question, the applicants had to bear a disproportionate and excessive burden (*Hutten-Czapska v. Poland* [GC], no. 35014/97, § 167 *in fine*, ECHR 2006-VIII). It submits in this regard States have wide discretionary powers in determining the general interest. However, these discretionary powers are not unlimited, and their exercise is placed under the control of the bodies of the Convention (see, among others, *Almeida Garrett and others*, cited above, §§ 49 and 52).

74. In the absence of observations from the parties on this point (see paragraph 70 above), the Court can only suppose that in this case, for the authorities, the general interest consists of the 'important political and financial consequences' (see paragraphs 36 and 46 above) which the determination of an amount of moral compensation for the applicants could lead to. Yet the Government does not produce any argument on the nature of the political consequences in question and neither does it provide any further explanations on the financial impact which the awarding of this compensation to the parties could have on the country's budget. It does not provide, for example, any detail regarding its available economic and budgetary funds or research regarding the resources necessary to compensate the applicants and other people who are found to be in the same situation.

75. In any event, to suppose in this case that the failure of the State to act, characterised by interference or abstention from acting (*Broniowski*, cited above, § 146), was pursuing a legitimate objective, does not allow in any way for the Court to conclude that a fair balance was maintained between the concurrent interests of the individual and the society as a whole. Notably, the Court does not see any reason why the State has failed, after more than 11 years, to take even the smallest step to starting the process of adopting the law envisaged in Article 9 of the law of 11 December 1997, namely, to determine exactly the number of victims concerned, to conduct economic, financial and social research on the loss and gain of the various members of society affected by this process, to

evaluate the prejudice suffered by each of the categories of victims, etc. The Government itself has not provided any convincing and reasoned arguments to explain this total passivity. Yet, while the question of general interest is at issue, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner (*Broniowski*, cited above, § 151; *mutatis mutandis*, *Beyeler v. Italy* [GC], no. 33202/96, §§ 110 *in fine* and 120 *in fine*, ECHR 2000-I). Therefore, in the eyes of the Court, a moral and financial choice in favour of the citizens who had been persecuted by the Soviet regime was consequently in operation, and it was up to the Georgian State, at least following the entry of Protocol no. 1 regarding Georgia into force, to carry out the task of consideration and action so as not to keep the applicants in uncertainty for an indeterminate period of time, against which they did not, moreover, have any effective domestic remedy. Furthermore, the State is apparently not ready to start this task, thus denying the elderly applicants any hope of enjoying, during their lifetime, the rights envisaged in Article 9 of the law of 11 December 1997.

76. Under these conditions, the Court concludes that the total failure to act for many years attributable to the State and preventing the applicants from having, within a reasonable delay, the effective enjoyment of their right to moral compensation, placed on the parties a disproportionate and excessive burden which could not be justified by a supposed legitimate general interest being pursued by the authorities in the case (see paragraph 74 above).

77. There was therefore a violation of Article 1 of Protocol no. 1.

78. In view of the above considerations, the Court does not believe it necessary to pronounce on the complaint of the applicants based on Article 13 of the Convention (see paragraph 32 above) and to also examine the application from the point of view of this provision.

III. ON THE APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

79. Under the terms of Article 41 of the Convention,

> ‘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.’

According to Article 46 of the Convention,

> ‘1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.’

A. Article 46 of the Convention

80. Before ruling on the demand for just satisfaction of the applicants, the Court believes it necessary to study the consequences which could result from the present judgment for the Respondent State in the field of Article 46 of the Convention.

81. Under the terms of this provision, the High Contracting Parties undertake to abide by the final judgments of the Court in cases to which they are parties, with the Committee of Ministers being charged with supervising the execution of these judgments. It notably results that, where the Court establishes a violation, the Respondent State has the legal obligation not only to pay the parties, where necessary, the sums allocated under the just satisfaction envisaged by Article 41, but also to select, under the control of the Committee of Ministers, general and/or, if need be, individual measures to be integrated into its domestic legal system in order to put an end to the violation established by the Court and to clear up the consequences as much as possible.

82. In principle, the Respondent State remains free, under the control of the Committee of Ministers, to select the means of discharging its legal obligation in regard to Article 46 of the Convention, in so far as these means are compatible with the conclusions contained in the judgment of the Court (*Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII ; *Assanidzé v. Georgia* [GC], no. 71503/01, §§ 198 and 202, ECHR 2004-II). However, once a failure of a structural nature has been identified, it is incumbent upon the national authorities, under the control of the Committee of Ministers, to take, retroactively if necessary, necessary measures to redress in accordance with the principle of subsidiarity of the Convention (see, among others, *Broniowski*, cited above, §§ 192 and 193; *Xenides-Arestis v. Turkey*, no. 46347/99, §§ 39 and 40, 22 December 2005; *Ghigo v. Malta* (just satisfaction), no. 31122/05, §§ 25-28, 17 July 2008; *Lukenda v. Slovenia*, no. 23032/02, §§ 89 onwards, ECHR 2005-X; *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 233, ECHR 2006), in a way so that the Court does not have to reiterate its establishment of a violation in a long series of comparable cases (*Driza v. Albania*, no. 33771/02, § 123 *in fine*, ECHR 2007-... (extracts); *Ramadhi and others v. Albania*, no. 38222/02, §§ 93 and 94, 13 November 2007; *Gülmez v. Turkey*, no. 16330/02, §§ 62 onwards, 20 May 2008; *Dybeku v. Albania*, no. 41153/06, §§ 63 and 64, 18 December 2007).

83. In relation to this, the Court refers to the terms of the resolution of the Committee of Ministers of the Council of Europe of 12 May 2004 (Res(2004)3) in which, having stressed the interest in aiding the State concerned in identifying the underlying problems and the necessary measures of execution (seventh paragraph of the preamble), it asks the Court to ‘identify the judgments where it establishes a violation of the

Convention which, in its opinion, reveals an underlying structural problem and the source of this problem, in particular where it is likely to cause numerous applications, in a way to help the States to find an appropriate solution and the Committee of Ministers to supervise the execution of judgments (paragraph I of the resolution).

84. As far as the present application is concerned, it must be recognised that the problem of the legislative void which it raises does not only concern the applicants. According to the estimates supplied by the applicants, the number of people affected by the situation which has caused a violation in this case could vary, according to the categories, between 600 and 16,000 (see paragraph 20 *in fine* above). This situation is therefore clearly likely to cause a large number of applications to the Court, in a way that would represent a threat in the future to the effectiveness of the system put in place by the Convention.

85. Under these conditions, the Court believes that general measures at a national level are without doubt called for within the framework of the execution of the present judgment. The necessary legislative, administrative and budgetary measures must therefore be rapidly taken in order for the people envisaged in Article 9 of the law of 11 December 1997 to effectively benefit from the right which they are guaranteed in this provision.

B. Article 41 of the Convention

1. Damages

86. The applicants request that the Government pay them a sum of 61,600 euros ('EUR') in material damages, given that the failure of the authorities to act is preventing them from fully benefiting from their rights guaranteed in Article 8 and 9 of the law of 11 December 1997. Based on estimates carried out by specialists, the applicants notably maintain that an apartment of 90 m² located at their parents' address of residence was worth, on 20 November 2006, 70,000 American dollars (47,446 EUR) and that the approximate value of the movable possessions to be found in the confiscated apartment was 7,030 EUR.

87. The applicants claim in addition a sum of 15,000 EUR each for emotional distress caused by the state of uncertainty and frustration which they have lived with for years due to the impossibility of asserting their rights guaranteed by the law of 11 December 1997. The applicants maintain that the suffering they have endured since early childhood will not be compensated by any sum of money, but that the amounts claimed above will procure them a certain emotional comfort.

88. In reaffirming that the applicants have never succeeded in proving the existence of a proprietary right to the possessions of their parents in

question, the Government believes that their request in this regard must be dismissed. It does not pass any comment on the remainder.

89. In respect of the material damages, since the losses which were effectively suffered as a direct consequence of the violation established above are not in question (*Comingersoll v. Portugal* [GC], no. 35382/97, § 29, ECHR 2000-IV), the Court does not believe that there is cause to grant the applicants the sum that they are claiming in this regard.

90. As to the moral damages, the Court does not doubt that as a result of the prolonged situation of uncertainty due to the established violation, the applicants, victims of political repression, aged 83 and 81 respectively, suffered from unquestionable emotional distress, which the establishment of the violation of the Convention appearing in the present judgment is not sufficient to remedy. It consequently believes that, if the necessary (legislative and other) measures mentioned in paragraph 85 above are still lacking, the Respondent State will have to pay each of the applicants, in six months from the day on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, 4,000 EUR in moral damages.

2. Costs and Expenses

91. The applicants are claiming 2,125 EUR for their representation in Court by Ms. S. Japaridze, being 50 EUR an hour, and 950 pounds sterling (1,050 EUR) for the representation by Mr. P. Leach, being 100 pounds sterling (110 EUR) an hour. The applicants provide the dates and number of hours spent for each of the advocates on preparing their application and reply to Government observations.

92. In addition, the applicants are requesting the reimbursement of 75 euros and 90 pounds sterling (99 EUR) for the various tasks completed by the administrative personnel of GYLA and EHRAC respectively (organising the translation of documents, faxing, postage, etc.). In addition, the reimbursement of 328.56 pounds sterling (363 EUR) is requested for the costs of translating Georgian documents into English (joint claim). The other costs which the applicants attest with supporting documentary proof are the following: approximately 56 EUR for mail sent by Chronopost from Tbilisi to Strasbourg (although the claims produced do not correspond to the Chronopost forms received by the Court with the mail concerned), 2.8 EUR corresponding to the tax paid to the Registry of Real Estate Property in order to obtain various information, and 80 EUR in fees paid to a specialist to determine the sale value of the apartment in question. The reimbursement of various secretarial costs (international telephone calls, etc.) in the amount of 70 pounds sterling (77 EUR) is also demanded without the corresponding supporting invoices.

93. The Government does not submit any comments.

94. In view of the established case law in the matter (see, among others, *Ghavtadze v. Georgia*, no. 23204/07, §§ 118 and 120, 3 March 2009), and

in so far as the above demands are validly supported and in relation to the established violation, the Court grants the applicants 1,950 EUR and 1,050 EUR for their representation before the Court for Ms. S. Japaridze and Mr. P. Leach respectively as well as 537 EUR for the other costs.

C. Default interest

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

FOR THESE REASONS, THE COURT,

1. *Declares*, by six votes to one, that the complaints based on Article 1 of Protocol no. 1 and Article 13 of the Convention are admissible as far as the right guaranteed by Article 9 of the law of 11 December 1997 is concerned, and the rest of the application is inadmissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 1 of Protocol no. 1;

3. *Holds*, by six votes to one, that it is not necessary to also examine the application from the point of view of Article 13 of the Convention;

4. *Holds*, by six votes to one,
   a) that, if the necessary (legislative and other) measures mentioned in paragraph 85 of the judgment are still lacking, the Respondent State will have to pay each of the applicants, in six months from the day on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following sums, to be converted into Georgian lari at the rate applicable on the day of settlement:
      i. 4,000 EUR (four thousand euros) in moral damages;
      ii. the total tax that may be chargeable on the aforementioned sums;
   b) that the Respondent State must pay the applicants, jointly in the three months from the day on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following sums, to be converted into Georgian lari at the rate applicable on the day of settlement:

i. 3,537 EUR (three thousand five hundred and thirty-seven euros) for costs and expenses;
ii. the total tax that may be chargeable on the aforementioned sum;

c) that to take into account the passing of said delays until payment, simple interest shall be added these amounts at an equal rate to the marginal lending rate of the European Central Bank applicable during this period, to which should be added three percentage points;

5. *Dismisses*, by six votes to one, the remainder of the demand for just satisfaction.

Executed in French, then communicated in writing on 2 February 2010 in accordance with Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé Registrar	Françoise Tulkens President

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

F.T.
S.J.D.

DISSENTING OPINION OF JUDGE CABRAL BARRETO

I regret that I am unable to follow the majority in their conclusion that there has been a violation of Article 1 of Protocol no. 1 concerning the rights guaranteed under Article 9 of the law of 11 December 1997.

1. The majority established a distinction between Article 8 (restoration of rights to possessions) and Article 9 (pecuniary compensation for political repression) of the law of 11 December 1997.

In the first case, there was no real and payable debt from which a legitimate 'hope' could arise (paragraph 60 of the judgment), while in the second there was 'a debt sufficiently established to be payable' (paragraph 68).

For my part, I do not perceive any difference between the two situations in the text of the law of 11 December 1997.

Article 8 demands a 'separate law' in order for rights to possessions to be restored; while Article 9 states that pecuniary compensation depends on the amount and rules of payment being defined in law.

In these two hypothetical circumstances, a subsequent legislative intervention would be needed in order to define the rights in question and bring them into effect.

It is this lack which the complaints of the applicants relate to, who 'allege that in delaying in giving substance to their rights guaranteed under Articles 8 and 9 of the law of 11 December 1997, the State was keeping them in a tormenting situation of uncertainty [...]' (paragraph 27) and that 'the failure to adopt the laws referred to in Articles 8 and 9 of the law of 11 December 1997 when they are necessary in order to bring their right recognised under these provisions into effect, is a violation of their rights under Article 1 of Protocol no. 1' (paragraph 31).

2. The behaviour of the State is, in my opinion, as questionable in one situation as in the other; the amount of time which has passed since 1997 is sufficient to be able to expect a strong feeling of anguish and frustration on the part of the eventual beneficiaries.

But this is not sufficient to conclude that there has been a violation of Article 1 of Protocol no. 1.

In order to declare a violation of this provision, it must be accepted that the applicants are the holders of a possession which is the subject of a debt 'payable' from the State.

The case law of the Court on the notion of a 'payable' debt can be summarised as follows: '[...] where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the

domestic courts confirming it' (Kopecký v. Slovakia [GC], no. 44912/98, § 52, ECHR 2004-IX).

Yet, in the present case, the domestic courts, notably the Supreme Court of Georgia, considered that 'given that no regulatory act relating to the payment of the compensation in question, as referred to in Article 9, had been adopted, the applicants' request for moral compensation was, at the given time, without grounds and could not be admitted' (paragraph 21) (bold added).

As it has no basis at a domestic level prior to the adoption of a law to specify the amount and rules of payment, the pecuniary compensation envisaged in Article 9 of the law of 11 December 1997 is not payable; this is what was declared by the domestic courts, and to which I also subscribe.

In this context and in light of our case law, I have to conclude that the existence of a payable debt was not established, neither in the law nor in the case law of the Georgian courts; the applicants are therefore not the holders of an 'existing possession', because they do not own a debt which is immediately payable of a form sufficiently established.

As the applicants themselves recognise, laws are necessary in order to bring their rights into effect.

3. Therefore, I do not believe that there has been a violation of Article 1 of Protocol no. 1.