OPINION OF ADVOCATE GENERAL ALBER

delivered on 15 February 2000 *

I — Introduction

1. The Commission brings the present Treaty infringement proceedings against the French Republic on several grounds.

2. First, it claims an infringement of Article 4(1) and (2) of Council Directive 79/409/EEC on the conservation of wild birds [1] ('the birds directive'); it alleges that France has failed to classify the region of Basses Corbières as a special protection area for certain species of birds, as defined by Annex I to the Directive, [2] and for certain migratory species. At the same time, it claims France has failed to introduce any special measures aimed at protecting the habitats of these species.

3. Second, the Commission claims an infringement of Article 6(2), (3) and (4) of Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna [3] ('the habitats directive'). France is accused in this connection of having failed to take suitable measures aimed at preventing the deterioration of natural habitats and the disturbance of species inhabiting the area, which could have significant effects. According to the Commission, such deterioration and disturbance would result from the opening and operation of a limestone quarry in the communes of Tautavel and Vingrau.

II — The relevant provisions

1. *The birds directive*

4. Article 1 of the birds directive states that the directive applies to all species of wild birds. Under Article 4, (stricter) special conservation measures apply to the par-

* Original language: German.

1 — Council Directive of 2 April 1979, OJ 1979 L 103, p. 1, last amended by Commission Directive 97/49/EC of 29 July 1997, OJ 1997 L 223, p. 9.

2 — 181 individual species are listed in the most recent version of Annex I.

3 — Council Directive of 21 May 1992, OJ 1992 L 206, p. 7.

ticular species indicated in Annex I and also to migratory birds.

5. The ninth recital in the preamble to the birds directive states:

'Whereas the preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds; whereas certain species of birds should be the subject of special conservation measures concerning their habitats in order to ensure their survival and reproduction in their area of distribution; whereas such measures must also take account of migratory species and be coordinated with a view to setting up a coherent whole'.

This premiss relating to a few particular species of birds is formalised by Article 4 of the Directive. That reads:

'Article 4

(1) The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

(2) Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly wetlands of international importance.

(3) ...

(4) In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats'.

2. *The habitats directive*

6. The aim of the habitats directive is defined by Article 2(1) as follows:

'(1) The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies'.

Article 2(3) makes the following qualification:

'(3) Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics'.

7. In relation to natural habitats, the habitats directive distinguishes between 'sites of Community importance' and 'special areas of conservation', although in certain cases these may be identical. According to the third subparagraph of Article 4(2), the list of areas falling into the first category is drawn up by the Commission following the procedure laid down in Article 21. By contrast, 'special areas of conservation'

are determined by the Member States themselves. Article 1 states in that respect:

'For the purpose of this Directive:

(a) to (k)...

(l) *special area of conservation* means a site of Community importance designated by Member States through a statutory, administrative and/or contractual act... .

(m) and (n)...'.

8. In accordance with the first sentence of Article 3(1), 'A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000'.

The second subparagraph of Article 3(1) states: 'The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC'.

9. With regard to the subject-matter and legal obligations in a special area of conservation, Article 6 of the habitats directive reads:

'Article 6

(1) For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

(2) Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the

areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

(3) Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to the appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

(4) If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest'.

10. In relation to special protection areas ('SPAs') under the birds directive, Article 7 of the habitats directive reads:

'Article 7

Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later'.

11. These provisions are explained by the seventh and tenth recitals in the preamble to the directive as follows:

'Whereas all the areas designated, including those classified now or in future as special protection areas pursuant to Council Directive 79/409/EEC ... will have to be incorporated into the coherent European ecological network'.

'Whereas an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future'.

III — Facts and procedure

12. The matter was brought to the Commission's attention following a complaint concerning plans to open a limestone quarry in the communes of Tautavel and Vingrau in the *département* of 'Pyrénées-Orientales'.

13. The Basses Corbières region is home to various species of birds meriting special protection, some of which are listed in Annex I to the birds directive, [4] in particular a pair of Bonelli's eagles, which belong to a species threatened with extinction. [5] The area also lies in an important European corridor for migrating birds. The French authorities have included the Basses Corbières as an area covering 47 400 hectares in a register of sites of importance for the conservation of wild birds (Zones Importantes pour la Conservation des Oiseaux sauvages; 'ZICO') under the designation ZICO LR07. Within that area, in 1991, the French authorities used a biotope order [6] to declare an area of some 231 hectares a biotope, with the primary aim of protecting the Bonelli's eagle in the territory of the communes of Vingrau and Tautavel. At the same time, a similar order [7] covering an area of some 123 hectares, also situated in the Basses Corbières region, was issued. A third order [8] led to the addition of a further area covering 280 hectares.

14. The Commission learned that the OMYA company had on 4 November 1994 obtained a licence to quarry limestone in the communes of Vingrau and Tautavel and also to erect processing facilities on site. The OMYA company has been operating a limestone quarry in the commune of Tautavel since 1968. Since the limestone deposits will be exhausted in the foreseeable future, the company applied for a licence to quarry limestone in the area referred to above, as there are deposits of a similar type and quality there. Geologically speaking, this constitutes an extension of the deposit into another commune.

4 — Subparagraph 1 of Article 4(1) of the birds directive reads: 'The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat, in order to ensure their survival and reproduction in their area of distribution'.

5 — According to the Commission's argument, these species include: *Hieraaetus fasciatus*, *Ciconia nigra*, *Ciconia ciconia*, *Pernis apivorus*, *Milvus migrans*, *Milvus milvus*, *Neophron percnopterus*, *Circaetus gallicus*, *Circus aeruginosus*, *Circus cyaneus*, *Circus pygargus*, *Tetrax tetrax*, *Bubo Bubo*, *Caprimulgus europaeus*, *Coracias garrulus*, *Lulluta arborea*, *Sylvia undata*, *Emberiza hortulana*.

6 — Arrêté préfectoral No 774/91 of 21 May 1991.

7 — Arrêté préfectoral No 773/91 of 21 May 1991.

8 — Arrêté préfectoral No 95.0226 of 22 February 1995.

15. Opponents of the project have appealed against the granting of the licence before the courts of the Member State. They have exhausted the legal redress available to them there. It is to be assumed that the licence was, in the last instance, declared valid.

16. The Commission presupposes that the limestone quarry will have serious consequences for the environment. It therefore brought the project to the attention of the French authorities in its letter of 10 November 1994. The aforesaid authorities replied with a letter of 19 September 1995. Since the Commission did not consider this response sufficient to eliminate suspicions of a Treaty infringement, it instituted proceedings for failure to fulfil obligations by a letter of formal notice worked on 2 July 1996. The French Government responded with a letter from its permanent representation dated 28 November 1996. Gaining the impression from that response that the French Republic had failed in its obligations under the birds directive and habitats directive, the Commission sent a reasoned opinion to the French Government on 19 December 1997, setting a time-limit of two months. In their reply of 12 June 1998, which the Commission received on 22 July 1998, the French authorities referred to a conflict between supporters and opponents of the limestone quarry in Vingrau, which had necessitated mediation, upon culmination of which the procedure for classifying *special protection areas*, within the meaning of the birds directive, would be initiated.

17. By application of 14 October 1998, lodged at the Court Registry on 16 October 1998, the Commission brought an action against the French Republic, claiming that the Court should:

— declare, first, that, by failing to classify the Basses Corbières site as a special protection area for the conservation of certain species of birds listed in Annex I to Council Directive 79/409/EEC and of certain migratory species not listed in that Annex, and by also failing to adopt special conservation measures concerning their habitat, contrary to Article 4(1) and (2) of that directive, and, second, that, by failing to take appropriate steps in relation to the Basses Corbières site to avoid disturbance of the species protected on that site and deterioration of their habitat likely to have a significant effect, as a result of the opening and working of limestone quarries within the municipalities of Tautavel and Vingrau, contrary to Article 6(2) to (4) of Directive 92/43/EEC, the French Republic had failed to fulfil its obligations under the Treaty; and

— order the French Republic to pay the costs.

18. The French Government has asked the Court — without making a specific applic-

ation — to rule the first cause of action partially unfounded and to reject the second cause of action.

19. The French Government recognises that the formal classification of *special protection areas* was not undertaken early enough. Nevertheless, it had taken appropriate steps to protect the ornithological interests of the Basses Corbières, so that they complied with Article 4(1) and (2) of the birds directive. It maintains that the first cause of action is therefore partially unfounded.

20. With regard to the second cause of action, the French Government argues that the limestone quarry project had been the subject of a comprehensive assessment concerning its compatibility with the Treaty. The requirements contained in Article 6(3) and (4) of the habitats directive had therefore been met. The second cause of action should therefore be dismissed.

21. The Court sent questions to the parties for their written response. It sought a response from both parties to a question with essentially the following content: In accordance with Article 7 of the habitats directive, the obligations arising from Article 4(4) of the birds directive are replaced by Article 6(2) to (4) of the habitats directive only in the case of areas already classified as *special protection areas* or recognised as such. In the Basses Corbières area, no special protection area had been classified when the deadline set in the reasoned opinion (20 February 1998) expired. The parties were therefore asked to explain why they nevertheless assumed that Article 6(2) to (4) of the habitats directive applied in the present case.

22. Whilst the Commission has submitted a detailed explanation, the French Government takes the view that Article 6(2) to (4) of the habitats directive does not apply. The second cause of action is therefore, in its view, inadmissible but, in any event, unfounded.

23. The Court has also asked the Commission for details concerning the mention made of the Basses Corbières in an ornithological survey of Europe entitled 'Important Bird Areas in Europe', as well as information on the size of each of the *special protection areas* in relation to the 'sites of importance for the conservation of wild birds', referred to as ZICOs, [9] and finally on the migratory routes of birds flying over the Basses Corbières region.

9 — Zones Importantes pour la Conservation des Oiseaux sauvages.

The Commission has answered all these questions in detail with the help of lists, maps and diagrams.

24. The presentations made by the parties will be returned to in the context of each of the legal questions raised.

IV — The first plea in law

1. *Arguments of the parties*

25. In its first plea, the *Commission* claims that there have been various infringements of Article 4 of the birds directive. First, it claims that the French authorities failed, contrary to their obligations, to classify the Basses Corbières site as a special protection area as defined by the provision, thereby infringing not only Article 4(1), because several species meriting protection according to Annex I to the Directive had their habitats there, but also Article 4(2), since the area is also important to the migratory movements of migratory species. With regard to other protection measures, as defined by Article 4(1), the French Republic had only partially fulfilled this obligation. The national biotope order No 774/91 relates only to the protection of the Bonelli's eagle. No special protection measures had been introduced either for other species living in the area that merited special protection or for migratory birds regularly visiting the area.

26. In its reply the Commission specifically points out that the critical time for assessing whether or not there had been an infringement of the Treaty was the deadline stipulated in the reasoned opinion, namely 20 February 1998. The subsequent classification of *special protection areas* could not alter this. However, even if the classifications made or planned in 1999 were taken into account, the extent of the *special protection areas* still had to be regarded as inadequate, amounting only to 1.35% of the ZICO. In order to demonstrate the region's importance for bird conservation, the Commission based its reply on a study conducted in March 1999 to designate sites of importance for the conservation of wild birds in France (ZICO). According to this, the Commission believes that a total area of at least 10 950 hectares should be classified as a *special protection area*. It argues that these areas are of vital importance to birds of prey. Furthermore, sites with a total area of 16 600 hectares, which are used primarily as hunting grounds for birds of prey, merit special protection and are therefore suitable for classification as *special protection areas*. In any event, the deterioration of such sites, as defined by Article 4(4) of the birds directive, should be avoided. The Commission regards the entire area of the

zones described, covering a total of 27 550 hectares and representing 58% of the ZICO, as a suitable reference framework for determining the 'most suitable sites' for the conservation of protected species. In the view of native experts, the site earmarked for the Vingrau limestone quarry is one of these zones meriting protection.

27. Finally, the Commission argues that the recent disappearance of Bonelli's eagle from the area suggests that it has been afforded insufficient protection. The Commission states that it is unaware of any criminal proceedings taken following the disappearance of the birds. All in all, insufficient protection measures had been taken within the meaning of the birds directive.

28. The *French Government* acknowledges that the classification of *special protection areas* under the birds directive was delayed in the Basses Corbières region. [10] This delay was due to a conflict between supporters and opponents of the planned extension to the limestone quarry. Opponents of the project had used the birds directive to prevent its implementation, although even local bird protection societies were of the view that the project was consistent with bird protection. Furthermore, they had exhausted all legal remedies available to them under the Member State legislation in an attempt to thwart the project and this had finally led to the French Conseil d'État (Council of State) rejecting the claim on the ground of misapplication and fining the 'Committee for the Defence of Vingrau' (Comité de défense de Vingrau) FRF 10 000 for misapplication. [11]

29. In the Government's submission, conflict must be viewed against a background of economic and social tension. The limestone deposits quarried in Tautavel are processed at the factory in Salses, an operation directly or indirectly guaranteeing some 200 jobs in a region of above-average unemployment running at 17.5% compared with a national average of 12%. The region's gross domestic product is below average, standing at FRF 92 800 compared with the national average of FRF 122 000. From an economic point of view, only Corsica ranks lower than the Languedoc-Roussillon region.

30. The conflict between supporters and opponents of the limestone quarry reached such a level that the former Minister for the Environment, Madame Bouchardeau, was appointed as mediator. A final settlement of the situation has still not been reached.

10 — In January 1999 *special protection areas* had been classified in the territory covered by biotope orders Nos 773/91 and 774/91. The procedure involved in classifying a further protection area covering 280 hectares, which was in turn based on a biotope order from 1995 (Prefect order No 95.0226 in the commune of Feuilla of 22 February 1995) was underway. The Commission had still not received notification at the time of the hearing.

11 — Judgment of the Conseil d'État of 29 December 1997 No 186354.

31. Although the conflict in itself was no justification for the delay in classifying *special protection areas*, the Government maintains that it does explain the attitude of the French authorities. In the interests of the survival of such a rare species as Bonelli's eagle, it was not appropriate for the birds to be pushed to the centre of the conflict.

32. In relation to the Member State's obligation to classify *special protection areas*, the French Government points out that the Member State has a certain amount of discretion when it comes to selecting the sites concerned. Neither was it obligatory for the entire area covered by each ZICO to be necessarily classified as a *special protection area*. The Commission had not indicated in its statement of claim exactly where the *special protection areas* requiring classification were to be located — ZICO LR07 Basses Corbières is, after all, a site covering some 47 000 hectares. Making reference to the register of ZICOs in France, the French Government declares that on the large ZICO sites, where the occasional presence of humans also has to be expected, only the most important segments are suitable for classification as *special protection areas*, the so-called hard core of the area of ornithological interest. The ZICO in the Basses Corbières area took in two *départements* [12] and was therefore only a reference framework within which the most suitable sites for bird protection must be established. Particularly with regard to birds of prey, which have a large hunting ground in the wild, the French Government did not intend to classify the entire territory as a *special protection area*. Furthermore, it was also difficult to define with any degree of accuracy the hunting ground of a bird of prey, as that depended on the season and the food sources actually available. The size of the hunting ground of Bonelli's eagle is given in the scientific literature as anywhere between 20 km^2 and 300 km^2. The hunting ground of a golden eagle — which has settled in the Basses Corbières area for the first time in recent years — is described as covering 160 km^2.

33. The French Government also refers in this connection to the opinion of Advocate General Fennelly in Case C-166/97, which states that 'Member States should be encouraged to arrange for comprehensive surveys of their national territories with a view to carrying out their duty of classification under the Directive. It would be counter-productive ... to treat every area identified as suitable for the protection of wild birds as automatically requiring classification.' [13]

34. In designating *special protection areas* in the Basses Corbières region, the French

12 — Pyrénées-Orientales and l'Aude.

13 — Cf. Opinion of Advocate General Fennelly of 10 December 1998 (judgment delivered on 18 March 1999, ECR I-1719, I-1721, paragraph 19).

authorities had been solely guided by ornithological criteria. According to the latest observations by the 'Groupe Ornithologique Roussillonnais (GOR)' and the 'Groupe de Recherche et d'Information sur les Vertébrés et leur Environnement (GRIVE)', as well as the 'ecological balance' of assessments on the implications of the limestone quarrying project in the communes of Vingrau and Tautavel, Basses Corbières is home to a traditional Mediterranean population of breeding birds. With the exception of the Bonelli's eagle, those birds are not rare. On the other hand, there are several legal documents relating to Bonelli's eagle as a species meriting special protection. [14] The French Government had demonstrated its firm intention to protect the Bonelli's eagle by issuing 19 biotope orders, 12 of them in the Languedoc-Roussillon district alone, the express aim of these being to protect the Bonelli's eagle, as well as other species.

35. With regard to other species meriting protection in the region, as indicated by the Commission, the French Government points out first that large birds of prey usually nest on similar terrain to Bonelli's eagle and, second, that their presence is demonstrated in a variety of ways. As a result, they may be nesting, resident or migrating. The criteria for classification of a *special protection area* primarily took account of the species included in Annex I to the birds directive, which were either resident or regularly nesting there. As a result, the hen harrier (*Circus cyanus*), the little bustard (*Tetrax tetrax*) and the common roller (*Coracia garrulus*) could only be regarded as nesting occasionally in the region.

36. With regard to migratory species — whether mentioned in Annex I to the birds directive or not — it must be remembered that the region is more an area through which the birds pass than a site in which they rest or feed. Although a few species, such as the white stork (*Ciconia ciconia*), the black stork (*Ciconia negra*), the black kite (*Milvus migrans*) and Montagu's harrier (*Circus pygargus*), could be observed resting or eating, there was no major congregating area in the Basses Corbières, as can be observed in coastal areas, for instance. Moreover, the number of birds flying over the Basses Corbières is influenced by wind conditions. If there is a breeze blowing from the sea in a south-east — north-west direction, it forces birds to fly over the first mountain ridges. By contrast, a north-west — south-east wind will cause the flying corridor to shift to the foothills beyond the ZICO and may even interrupt the birds' flight. Furthermore, to the French Government's knowledge, no

14 — Cf. Directive 79/409, Annex I; the Bern Treaty on the Conservation of European Wild Plants and Animals and their Natural Habitats, Annex II (cf. Council Decision 82/72/EEC of 3 December 1981, OJ 1982 L 38 of 10.2.1982, p. 1); according to the argument put forward by the French Government, the Bonelli's eagle, like other birds of prey, is protected by conservation measures under the Nature Conservation Law of 10 July 1976.

scientific count has been made of birds migrating over the Basses Corbières, which prevents any reliable conclusions from being drawn in relation to the number of birds regularly passing through this area. France's decision to concentrate its wild bird protection policy in the Basses Corbières primarily on Bonelli's eagle, while also taking account of the other species with a habitat there, was therefore scientifically based.

37. Three biotope orders had been issued for the Basses Corbières region alone. These protected four Bonelli's eagle nesting sites, two of which were in the communes of Tautavel and Vingrau and two in the communes of Maury, Vlanèzes and Raziguières. Finally, a region in the commune of Feuilla in the *département* of Aude covering an area of 280 hectares was also protected. It explicitly follows from the text and from the annexes to the biotope orders that they were issued not only to protect Bonelli's eagle, but also for at least 13 other species meriting conservation in accordance with Annex I to the birds directive. [15]

15 — *Ciraetus gallicus, Aquila Chrysaetos, Caprimulgus europaeus, Anthus campestris, Sylvia undata, Pyrrhocorax Pyrrhocorax, Emberiza hortulana, Bubo Bubo, Pernis apivorus, Milus migrans, Circus pygargus, Lullula arborea, Falco peregrinus.*

2. *Assessment*

38. With regard to the first complaint in the first plea, namely failure, contrary to obligations, to classify *special protection areas* in the Basses Corbières, an examination of obligations in the abstract can be dispensed with, since the French Government has expressly acknowledged its omission. Since the clear establishment of a Treaty infringement depends on the situation at the deadline set in the reasoned opinion, [16] even the subsequent classification of *special protection areas* cannot rectify the infringement. In view of the fact that this first complaint is based on formal classification, the content of the biotope orders is not an issue here. An infringement of the Treaty on the grounds of failure to observe the obligations arising from Article 4(1) of the birds directive can therefore be immediately established on this basis, without having to conduct an evaluation of the geographical location and size of the *special protection areas* requiring classification.

39. With regard to the second complaint in the first plea, namely of failure to introduce special conservation measures in relation to the habitats of the species listed in Annex I to the birds directive, within the meaning of the first sentence of Article 4(1), the situa-

16 — Cf. judgment of 25 November 1999 in Case C-96/98 *Commission* v *France* [1999] ECR I-8531, paragraph 19).

tion is different. Article 4(1) instructs the Member States to take special protection measures, of which the classification of *special protection areas* is only *one* — albeit the preferred ('in particular') one. According to Article 4(2), a comparable regime ('similar measures') applies to 'regularly occurring migratory species not listed in Annex I ... as regards their breeding, moulting and wintering areas and staging posts along their migration routes.'

40. It is not disputed that a variety of species included in Annex I to the birds directive have their habitats in the Basses Corbières. However, there is disagreement between the parties in relation to certain species and, above all, as to whether the species concerned are resident in that region, occasionally nest there, or are migratory birds. Both the Commission and the French Government base their assertions on the appraisals of ornithological experts, which should not be substituted by the Court.

41. In so far as the species mentioned in Annex I are concerned, a purely juridical evaluation would suggest that they were eligible for the special protection status laid down by Article 4(1) of the birds directive. The provision does not make any distinction on the basis of the birds' way of life or biological classification, but refers generally to the list contained in Annex I.

42. For the purposes of the following examination, it can and must be assumed that various species, in the order of between 10 and 20, of those listed in Annex I to the birds directive have their habitats in the Basses Corbières. There is no dispute between the parties that special attention should be paid to birds of prey and, among these, to Bonelli's eagle as a species threatened with extinction in Europe. Both parties to the proceedings have made Bonelli's eagle the focus of their arguments. However, the Commission's charges in this respect are more directed towards the French authorities having neglected all other species meriting protection.

43. Consequently, the first area to examine is whether 'special protection measures' were taken for these species meriting protection. In assessing this question, it may be important to establish whether any protection measures were taken appropriately and in the required degree. It will then be necessary to start a comparative examination of the migratory species not included in Annex I to the birds directive in relation to the circumstances specified in Article 4(2). The biotope orders Nos 773/91, 774/91 and 95.0226 dated 1991 and 1995

mentioned by the French Government can be considered as protection measures within the meaning of the provision. These cover areas of 123, 231 and 280 hectares respectively, thus producing a total of 634 hectares in the Basses Corbières with a special status in relation to bird conservation. The wording of biotope orders Nos 773/91 and 774/91 is virtually identical, while order No 95.0226 is formulated differently from these two. What all three have in common is the fact that the classified biotopes expressly refer to Bonelli's eagle in their titles. [17] However, the object of protection in the orders is defined in the *recitals in the preambles* to orders Nos 773/91 and 774/91 as 'Bonelli's eagle and other protected species included in the list in the annex to the order.' The lists contain 41 [18] and 38 [19] species, respectively, about a third of which appear in Annex I to the birds directive. [20] However, a fact that is of secondary importance for the purposes of the present proceedings, but is of interest in that it completes the description of the fauna protected by the biotope orders, is that the annex to the biotope orders includes other animals, apart from birds, such as insectivores (hedgehogs), alipeds, rodents and carnivores.

44. Article 1 of biotope order No 95.0226 contains an analogous description of the object of its protection. It also speaks of 'Bonelli's eagle and other registered animal species, a list of which is attached as an annex to the order'.

45. The protection measures for the designated species of birds and animals are described differently in the 1991 orders and the 1995 order. The biotope orders of 1991 expressly forbid any entry to the site, particularly for the purposes of rock climbing, during the period between 15 January and 30 June. The only exceptions to that ban are for maintenance work by the owners of the land and certain activities aimed at protecting the birds. Any interference with the integrity of the site's biological equilibrium is prohibited. Only limited exceptions are made to that general ban, for conservation measures involving eagles and to uphold public order and safety. Fires and pollution of the site in any form are prohibited.

46. Order No 774/91 expressly permits the erection of a visual screen [21] by the company OMYA to screen waste. Attached to this permission was the obligation to conceal the visible screen by planting it up with native vegetation.

17 — Cf. Article 1 of each of the biotope orders.

18 — Cf. order No 773/91.

19 — Cf. order No 774/91.

20 — Cf. Annex I to the birds directive in the version contained in Directive 91/244/EEC of 6 March 1991 (OJ 1991 L 115, p. 14).

21 — This probably means a screen in the form of an earthwork.

47. Biotope order No 95.0226 contains a far more detailed description of the banned activities. Specific activities are prohibited, such as the trampling or pulling-up of vegetation, leaving the paths through the site, motorbikes and cycling, etc. However, the detailed list of banned activities does not necessarily signify more intensive protection than that afforded by biotope orders Nos 773/91 and 774/91. The bans are simply more widely formulated there.

48. The important thing here is not essentially to determine differences in the level of protection afforded by the biotope orders. Rather, it is the question of whether adequate protection is guaranteed for birds who have their habitat in the area and are to be regarded under Community law as species meriting protection. The answer to this is probably yes. All bans and sanctions contained in the biotope orders benefit the flora and fauna in the protected regions. The closure of the site between 15 January and 30 June provided for in orders Nos 773/91 and 774/91 and the explicit ban on mountaineering during that period was prompted by the need to protect nesting sites and observe the breeding season of Bonelli's eagle. It follows that other species with similar nesting habits, birds of prey in particular, will also benefit from the protection. A conspicuous illustration of this claim is the arrival of the golden eagle which has settled in the region *since* the biotope orders were issued.

49. The Commission's contention that the biotope orders are unilaterally aimed at protecting Bonelli's eagle is therefore rejected. Both the preferential position held by Bonelli's eagle and the associated material protection afforded the other protected species appear adequate.

50. If the Commission points out that the French Government only provided notification of biotope order No 774/91 during the pre-litigation procedure and not of biotope orders Nos 773/91 and 95.0226, this may have been due to a misunderstanding, because it is entirely undisputed that it was the licence for the limestone quarry in the communes of Tautavel and Vingrau that was the cause of the proceedings and biotope order No 774/91 covers this very site. Since the charge extends to the entire Basses Corbières area, the French Government had every reason for mentioning all the measures adopted in this area. In any event, the Court is not prevented from taking account of the protection measures introduced in the Basses Corbières area.

51. The Commission is of the view that the inadequacy of the protection measures is demonstrated by the fact that in 1998 [22] a Bonelli's eagle (male) and recently [23] its mate have disappeared from Vingrau's

22 — According to the Commission's argument of April 1998.
23 — Récemment.

steep coastal crags. Elsewhere, too, in the site covered by biotope order No 773/91, a pair of Bonelli eagles had disappeared.

52. Firstly, as the French Government quite rightly argues, the possibility that the disappearance was due to natural causes cannot be discounted. Secondly, the French Government has argued without challenge that in June 1999 a Bonelli eagle was sighted over the crags of Vingrau. Moreover, both parties have expressed the hope that the Bonelli eagles may once again settle at the familiar nesting sites; the Commission in order to stand firm with its argument as to the need for protection, the French Government in order to document the adequate degree of protection provided.

53. The delayed disappearance of the Bonelli's eagle would not necessarily appear to challenge the suitability of the biotope orders to protect fauna, particularly since a pair of golden eagles recently settled, something that is indicative of a relatively untouched landscape and an undisturbed environment.

54. The Commission also seems to have certain doubts that the failure of the pair of Bonelli eagles to appear at their usual nesting places is due to environmental causes, yet it implicitly requires of the French Government that it should undertake criminal investigations into the birds' disappearance.

55. One can therefore conclude that the biotope set up by the Decree is a suitable means of protecting Bonelli's eagle *and* the other birds meriting protection that live in the area. Linked to this, however, is the question of whether these measures were introduced to a sufficient extent.

56. Both during the pre-litigation procedure and in its statement of claim, the Commission made the general charge of failure to introduce suitable protection measures in the Basses Corbières area. With regard to the failure to classify *special protection areas*, a general charge is justified in view of the complete absence of such measures. If certain measures are in place, on the other hand, it is difficult to check whether these are adequate, particularly if no further details are given in the applicant's claim as to *which measures* should have been taken in *which site*, giving a precise geographical location.

57. The designation of ZICO LR07 naturally provides an initial reference point. The Court has already ruled on the relationship between the area covered by a ZICO and the classification of *special*

protection areas, saying that they need not necessarily be identical. 'Clearly, the mere fact that the site in question was included in the inventory of ZICOs does not prove that it ought to have been classified as an SPA.' [24] It was only in its reply and based on a study from March 1999 that the Commission designated certain regions within ZICO LR07 that should have been classified as *special protection areas* or were still to be classified as such.

58. To be able to assess whether the special protection measures taken in the form of biotope orders — beyond the omitted classification of *special protection areas* — were sufficient to satisfy the legal requirement, the first thing must be to establish the criterion for this. This can be achieved through the analogous application of the authorities on the relationship between the area covered by a ZICO and the required classification of *special protection areas*. Both in Case C-166/97 [25] and also in Case C-96/98 [26] the Commission accused the French Republic of having failed to classify sufficient areas as *special protection areas* within the framework of sites of importance to the conservation of wild birds (ZICO). In both cases, judgment was passed against the French Republic on this particular point. It must be noted, however, that the French Republic acknowledged its omission in both cases.

59. In Case C-166/97, an area measuring 21 900 hectares in the Seine estuary was recognised as a ZICO. Moreover, it was to be understood that 7 800 hectares of the estuary had been included in the European ornithological inventory published in 1989 and entitled 'Important Bird Areas in Europe'. In this particular case it was not sufficient for a 2 750 hectare site to be declared a special protection area.

60. The circumstances were similar in Case C-96/98. 77 900 hectares of land in the Poitou marsh had been declared a site of importance to the conservation of wild birds (ZICO). In the European ornithological inventory entitled 'Important Bird Areas of Europe', the Poitou marsh was recorded as covering an area of 57 830 hectares. At the critical time for the purposes of the Treaty infringement proceedings, an area of 26 250 hectares had been declared an SPA. Following further classifications, the area covered by the SPA had grown to 33 742 hectares by April 1996. The additional classification of 15 000 hectares was announced during the proceedings. Without further specifying the sites requiring classification, the Court upheld the infringement acknowledged on its merits by the French Government.

61. One could possibly conclude from the two judgments that in the case under consideration here the numerical incongruity between the area covered by ZICO LR07 and the SPA protected under the biotope orders implies an infringement. It is generally accepted that the Basses Corbières ZICO was acknowledged as covering 47 400 hectares. In the European ornithological inventory entitled 'Important Bird

24 — Cf. judgment in Case C-166/97 (cited at footnote 13, paragraph 42).

25 — Cf. judgment of 18 March 1999 (cited at footnote 13).

26 — Judgment of 25 November 1999 (cited at footnote 16).

Areas in Europe', the Corbières in Languedoc-Roussillon are recorded as covering 150 000 hectares. However, the Corbières thus designated include both ZICO LR07 Basses Corbières and also ZICO LR06 Hautes Corbières. Consequently, these numerical comparisons must be treated with care, since the sum of the areas covered by ZICO LR06 and LR07 is 122 150 hectares,[27] whereas the site recorded in the 'Important Bird Areas of Europe' is estimated at 150 000 hectares, producing a discrepancy of some 27 000 hectares. These areas compare with the SPAs totalling 680 hectares, through the biotope orders under discussion. This represents a proportion of 1.35%.

62. It must be remembered, however, that during the course of the proceedings the French Government has taken the view that it has fulfilled all the obligations incumbent on it under the birds directive through the classification, albeit delayed, of the SPAs in Basses Corbières, which are identical in terms of area to the sites protected under the three biotope orders. To establish an objective criterion for judging whether the extent of this can be deemed an adequate fulfilment of the Member State's obligations, it may be helpful to consider the SPAs already classified in the past relative to the designated ZICOs. In order to obtain a global appreciation of the classification of ZICOs undertaken in France by the 'Ligue pour la protection des oiseaux' (LPO), it should be noted that according to a study conducted in 1995 there are 285 ZICOs. The LPO has classified seven categories according to their ornithological importance. The categories are as follows:

— Class A' with 6 ZICOs of quite exceptional importance

— Class A with 27 ZICOs of exceptional importance

— Class B with 21 ZICOs of very great importance

— Class C with 32 ZICOs of great importance

— Class D with 42 ZICOs of average importance

— Class E with 65 ZICOs of very considerable importance

27 — ZICO LR06 is estimated as covering 74 750 hectares and ZICO LR07 47 400 hectares.

— Class F all other ZICOs of considerable importance.

63. Classification as an SPA can therefore also depend on the class into which the sites fall. At the Court's request, the Commission produced a summary of the extent to which SPAs were classified in ZICOs of class C and under. The table suggests that in a few ZICOs 80%, 90% or even 100% of the area had been classified as SPAs. In one region, the 'Estuaires du Trieux et du Jaudy', the classified SPA even extends beyond the limits of the ZICO. A high percentage of classified land does not necessarily depend on the extent of the ZICO either. 100% of the class D ZICO of the 'Parc national des Cévennes', covering 84 000 hectares, was declared an SPA. On the other hand, there are also instances where the classified sites represent very small percentages, such as

— 0.58% in a class D ZICO (Barthes de l'Adour)

— 1.91% in a class E ZICO (Penes du Moulle de Jaut)

— 0.32% in a class F ZICO (Fresnes en Woevre — Mars la Tour)

— 0.83% in a class D ZICO (Plateau de l'Arbois, Garrigues de Lançon et chaîne des côtes)

— 0.21% in a class D ZICO (Lac Léman)

— 0.45% in a class E ZICO (Basse-Ardèche).

In class C, apart from the area indicated for the Basses Corbières of 0.76%, there are percentages of

— 43.77 (Baie de Saint-Brieuc)

— 72.12 (Montagne de la Clape)

— 96.09 (Cap Gris-Nez)

— 82.42 (Estuaires Picards: Baies de Somme et d'Authie)

— 11.83 (Traicts et Marais Salants de la Presqu'île guérandaise)

— 37.5 (Iles d'Hyères)

— 31.53 (Hauts Plateaux du Vercors et Forêt des Coulmes)

— 78.11 (Parc national de la Vanoise).

This numerical comparison may principally be an indication that the amount of land classified as *special protection areas* in the Basses Corbières is inadequate. However, in order to avoid hasty conclusions, it must be remembered that of the 199 ZICOs in classes C, D and F, only 64 appear in the list supplied by the Commission. That represents only one third of these ZICOs. There is therefore a good deal to suggest that *no* SPAs were classified in the majority of designated ZICOs — around two thirds of them. The figures alone are therefore probably insufficient evidence of a Treaty infringement.

64. The essential element, therefore, is the extent to which the Commission was able to convince the Court of the additional protection measures that should have been taken. Only in its reply did the Commission [28] designate specific sites that, in its view, were particularly suitable for classification as SPAs. It had evidently been unable to give a concrete description of what it felt to be the required approach earlier on in the proceedings. Taking the abstract charge of failure to introduce special protection measures as the basis for finding against the defendant in the Treaty infringement proceedings, when a few — in some cases inadequate — measures had in fact been taken, is beset with problems.

65. So even if a comparison of areas between the ZICO and the sites protected under the biotope orders were to be an indication of the inadequacy of the conservation measures taken in relation to their geographical size, this would probably not be sufficient in itself to allow one to conclude the existence a Treaty infringement.

66. There must be additional elements enabling one to identify where the protection is inadequate and for which species. Against this background, the Commission's assertion that the French authorities had not given sufficient consideration to the migratory birds frequenting the Basses Corbières site is relevant.

28 — Based on a study conducted by the GOR in March 1999.

67. It can probably be assumed in that respect that at the critical time for the purposes of the Treaty infringement proceedings, no special measures had been adopted in relation to migratory birds, either in the form of the classification of *special protection areas* or special protection measures of another type. The biotope orders do not demonstrate that they provide specific protection for migratory birds.

68. However, Article 4(2) of the birds directive calls for 'similar measures' [29] for 'regularly occurring migratory species' 'as regards their breeding, moulting and wintering areas and staging posts along their migration routes'. The Commission has demonstrated with the help of maps that the Basses Corbières must be regarded as a route used by migratory birds, something that the French Government does not dispute in principle either. However, the Commission has never claimed that the Basses Corbières is a breeding, moulting or wintering area for migratory birds. In order to embody a special need for protection, as defined by the Directive, the site would at least have to be a 'staging post' for migratory birds. The French Government has argued that there are no identifiable zones in the Basses Corbières capable of being designated 'staging posts'. It maintains, in particular, that there are no specific congregating areas for migratory birds, as there are in coastal areas, for instance.

69. It should be mentioned in passing that the French Government has conceded that storks, black kites and Montagu's harriers can occasionally be seen resting or feeding there. Significantly, these are species included in Annex I to the birds directive, whose arrival in a region gives cause for the introduction of special protection measures.

70. Otherwise, the Commission has failed to give any indication as to whether and, if appropriate, where the staging posts of migratory birds are to be found. Against this background, the complete absence of special protection measures for migratory birds could lead one to conclude, at worst, that the Member State has failed in one of its duties. Nevertheless, the simple fact that an area lies in a flying corridor used by migratory birds cannot be sufficient to unleash the duties incumbent on a Member State under Article 4(2) of the birds directive.

71. Other circumstances indicated in Article 4(2), which compel a Member State to act, must also exist. Therefore, the charge

29 — Special protection measures and special protection areas.

of failure to introduce protective measures for migratory birds based on Article 4(2) of the birds directive must be rejected.

72. In the context of the first cause of action, therefore, it is only the charge of failure to classify *special protection areas*, as defined by Article 4(1) of the birds directive, that constitutes an infringement of the Treaty.

V — On the second cause of action

1. *Arguments of the parties*

73. The *Commission* claims with its second cause of action that the French Republic has failed to take appropriate measures to prevent disturbance of the birds inhabiting the Basses Corbières and deterioration of their habitat. The obligations arising from Article 4(4) of the birds directive would also apply to sites that had not been declared *special protection areas*, contrary to Article 4(1) and (2) of the directive.

74. In view of the fact that since the date of implementation of the habitats directive, i.e. 10 July 1994, the obligations under Article 6(2), (3) and (4) of the habitats directive have replaced those arising from the first sentence of Article 4(4) of the birds directive, the Commission believes that the provisions of Article 6(2) to (4) of the habitats directive should also be applied to the present case. The limestone quarry had been opened in defiance of these provisions, it is claimed.

75. The quarry had resulted in significant deterioration. It had reduced the size of Bonelli's eagle's hunting ground, something that can cause problems, particularly when rearing young. In addition, the limestone quarry had led to visual and acoustic deterioration. The noise, in particular, and also power lines could represent a danger to the Bonelli eagles.

76. It is true that the French authorities indicated that permission for the quarry had been granted under conditions meeting the requirements of Article 6(3) of the habitats directive, in that a comprehensive assessment of its implications had been carried out. Compensatory measures had been introduced based on the results of this study, in order to reduce the quarry's impact on the natural environment. How-

ever, the Commission had never seen the study. The information supplied to the Commission was therefore insufficient to enable it to assess whether or not the licence procedure satisfied the requirements of Article 6(2) to (4) of the habitats directive. The attempt made to justify this subsequently could not therefore eliminate the infringement of the provisions under the Directive.

77. In its reply, the Commission specifically points out that the studies undertaken were incomplete and did not satisfy the requirements of Community law. Furthermore, the French Government spoke only of precautionary measures (mesures de précaution) and not of compensatory measures (mesures compensatoires), as laid down by the directive.

78. The *French Government* begins by pointing out that the Commission has produced no evidence to the effect that the limestone quarry causes significant disturbance to the pair of Bonelli's eagles and other protected birds. The French Government claims that:

(a) no scientific study had concluded that the enterprise could have a significant impact on protected species and Bonelli's eagle in particular,

(b) the opening of the quarry had been preceded by a comprehensive assessment of its implications that had concluded that the project would have no significant impact on the environment,

(c) precautionary measures had been taken to prevent any negative impact on the environment.

With regard to (a)

79. The French Government begins by pointing out that the limestone quarry had been in operation in the commune of Tautavel since 1968. Throughout this time, the Bonelli eagles had nested on the crags at Vingrau each year without any evident disturbance.

80. Even when the biotope order was issued, the French Government had advocated expanding the conservation sites, to prevent the Bonelli eagles' nesting sites

from being disturbed by mountaineers. Furthermore, local nature conservation groups had been involved in planning the expansion of the limestone quarry, in order to prevent any deterioration of the nesting sites.

81. Scientific investigations conducted at national level had shown that although Bonelli's eagle is threatened by man, it is also equally at risk from natural causes. Thus, for instance, an unusually high mortality among young eagles had been observed for a number of years and must be attributed to a parasitic attack (*Trichomonas columbiae*) on birds of prey.

82. Furthermore, the power lines supplying the quarry had been laid underground, so they could not represent an acute risk to the birds. In order to reduce any noise impact, a natural screen had been erected. It can also be inferred from the assessment of the project's implications, which preceded the licensing, that almost all animals were capable of becoming accustomed to noise, as demonstrated by the quarrying operation at Tautavel.

83. Great care had to be taken when defining the hunting ground of Bonelli's eagle. It was of such magnitude as to prevent one from concluding that the quarry could lead to a 'significant' deterioration in the eagles habitat. The limestone quarry and associated installations were spread over an area of 30 hectares, whereas the Basses Corbières ZICO covers some 47 000 hectares.

With regard to (b)

84. The French Government first disputes the Commission's assertion that no alternative solutions to the project had been considered. Both the company OMYA and the French authorities had looked into possible alternatives. The limestone deposit at Salses-Opoul mentioned by the Commission had been considerably smaller than that at Vingrau-Tautavel. While the deposit at Salses-Opoul could have been expected to run out within eight or nine years of working, a 30-year licence had been granted for quarrying at Vingrau-Tautavel. There were therefore no alternatives.

85. Apart from this, a complex assessment of the implications had been undertaken in accordance with the prevailing national law. The study had been based on eight preliminary investigations (geological, hydrological, on the course of the quarry, acoustic disturbances, vine cultivation, dust

deposits and the natural environment). All studies had been prepared before the critical date of implementation of the habitats directive, namely, 10 June 1994. The Conseil d'État had specifically commented on the scope and content of the studies and had come to the conclusion that the assessment of the project's implications had been of sufficient magnitude according to the requirements of national law.

86. All possible sources of interference with the birds' habitat mentioned by the Commission, namely, noise, power lines and a reduction in the size of the hunting ground of birds of prey, had been examined.

With regard to (c)

87. Finally, a series of precautionary measures had been adopted. To protect the eagles' hunting ground, watering places were to be set up and meadows maintained, favouring the reproduction of small game. At the suggestion of local ornithologists, the company OMYA had expressly undertaken to colonise the area with species of small game, in order to increase the eagles' food sources. The introduction of hares was planned.

88. To protect the adjacent natural environment, a natural screen had been erected. This was capable of moderating both optical and acoustic impairments. All measures came together to produce an overall plan aimed at maintaining the natural environment. Thus, the changes in the landscape associated with limestone quarrying were not irreversible either. The project manager was entrusted with the restoration of the area's natural appearance.

89. With regard to clarifying the terminology used, the French Government points out that the term 'compensatory measures' (mesures compensatoires) had been used within the meaning of national law [30] and included measures aimed at lessening any impact a project might have. By contrast, the term used in Article 6 of the habitats directive refers to measures aimed at compensating for the negative effects on a habitat. To eliminate any misunderstandings, the French Government had used the term 'precautionary measures' (mesures de précaution).

90. With regard to substance, it had to be stated that the French authorities felt the quarrying could not be expected to have a 'significant' impact on the birds' habitat, which meant that the Commission did not have to be notified of any compensatory measures as defined by Article 6 of the habitats directive.

30 — With reference to Article 2 of Law No 76/629 of 10 July 1976 — Nature Conservation Law.

2. *Appraisal*

On the applicability of the habitats directive

(a) The applicability of the habitats directive to the present case is questionable in so far as the licensing procedure involved in extending the limestone quarry undoubtedly began before the date cited for complete applicability of the directive, namely 10 July 1994. It is true that the licence was only granted on 9 November 1994. Nevertheless, there are a number of factors suggesting that the licence application had been made far earlier. Firstly, the French Government mentions that all individual studies for the assessment of the project's implications had been carried out long before July 1994. Secondly, it states that a licence to extend the limestone quarry had already been granted in 1991 and this, following objections by opponents to the project, was now also valid. In the end, the company OMYA had two licences for the same project, with the later one laying down more stringent conditions than the earlier one. As a result, it is only the later one that is the subject-matter of the present proceedings.

91. In Treaty infringement proceedings in Case C-431/92, [31] brought by the Commission against the Federal Republic of Germany on the grounds of failure to observe the directive on the assessment of environmental effects [32] in a specific project, the Federal government defended itself by arguing that the licensing procedure concerned had already been initiated before the critical date for implementation of the directive. The argument did not succeed, since the Court focused on the *formal* initiation of the licensing procedure, which was indisputably after the critical date and, to that extent, all preliminary proceedings could be regarded as irrelevant. The possibility cannot be excluded that the Federal government's argument might have been upheld, had the sequence of events been different.

92. In the present proceedings, the precise date marking the formal beginning of the licensing procedure is not contained in the documents. Therefore, the examination is to continue below, despite the reservations that exist.

(b) A second objection to the applicability of the habitats directive in terms of its content emerges from the inclusion of the birds directive in the habitats directive pursuant to Article 7 of the latter. According to Article 7 of the habitats directive, the obligations arising from Article 6(2) to (4) of this directive replace those arising from

31 — Judgment of 11 August 1995 *Commission* v *Germany* [1995] ECR I-2189.

32 — Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

the first sentence of Article 4(4) of the birds directive, specifically with regard to sites classified as SPAs or recognised as such, within the meaning of Article 4(1) and (2) of the birds directive. According to Article 7, this applies from the date of implementation of the habitats directive or thereafter 'as from... the date of classification or recognition by a Member State under Directive 79/409/EEC ...'.

93. This wording, therefore, quite clearly focuses on the fact that the site must first have SPA status, as defined by the birds directive, before the obligations laid down in Article 6 of the habitats directive can apply. The deferred validity for protected areas already classified 'from the date of implementation of this directive' and for those still to be classified 'from the date of classification or recognition ...' leaves no scope for any other interpretation.

94. The first formal classification of *special protection areas* in the Basses Corbières took place in 1999. [33] Based on a literal interpretation, therefore, the habitats directive cannot be applied to the events forming the subject-matter of the present Treaty infringement proceedings.

95. Having been made aware of these problems, the Commission nevertheless maintained its view that Article 6 of the habitats directive should apply to the present case. Its argument is as follows. In its judgment of 2 August 1993 in Case C-355/90 [34] the Court ruled that the obligations arising from Article 4(4) of the birds directive had to be observed not only if an SPA had been classified beforehand. [35] This authority was supported by the judgments in cases C-166/97 [36] and C-96/98. [37] According to these, the obligations arising from the first sentence of Article 4(4) of the birds directive had to be observed, even if the site concerned had not been classified an SPA, although it should have been. [38]

96. The arguments supporting the applicability of Article 4(4) of the birds directive, even in the absence of any SPA classification, would also apply to the applicability of Article 6(2) to (4) of the habitats directive. If this were not the case, a duality of provisions would exist under Article 4(4) of the birds directive, on the one hand, and Article 6(2) to (4) of the habitats directive, on the other. The provision of Article 4(4) of the birds directive was in some senses

33 — The classified areas correspond to the biotope orders; cf. point 13 above and footnotes 6, 7 and 8.

34 — *Commission* v *Spain* [1993] ECR I-4221.

35 — Cf. Case C-355/90 (cited at footnote 34, paragraph 22).

36 — Cited at footnote 13.

37 — Cited at footnote 16.

38 — Cf. judgment in Case C-166/97 (cited at footnote 13, paragraph 38) and judgment in Case C-96/98 (cited at footnote 16, paragraph 46).

more rigorous, as it did not provide for the possibility of exceptions to the same extent as Article 6(2) to (4) of the habitats directive. It would be paradoxical if the stricter provision were to apply to sites that had not actually been classified than to formally classified *special protection areas* or those recognised as such.

97. It is true that the Court acknowledged the applicability of Article 4(4) of the birds directive to sites that should have been classified *special protection areas* in accordance with Article 4(1) and (2), but had not actually been classified. However, the legal consequence attached to this by the Commission in favour of the applicability of Article 6(2) to (4) of the habitats directive is not the only one possible. To avoid an interpretation of Article 7 of the habitats directive *contra legem*, another formulation may be preferred. In this case, it can be assumed on the basis of existing authorities [39] that the Member States take appropriate measures in accordance with Article 4(4) to avoid the pollution or deterioration of habitats and disturbance of the birds, in so far as these would have a significant impact on the aims of this Article, specifically in areas that should have been classified as SPAs within the meaning of paragraphs 1 and 2 of the article.

98. The procedural law position in which the Court postulated this obligation for the first time should be noted here. The Kingdom of Spain was charged in the context of Treaty infringement proceedings with having failed to meet its obligations under Article 4(1) and (2) of the birds directive. In response to the further accusation that it had also failed, contrary to its obligations, to take appropriate measures within the meaning of Article 4(4), the Spanish Government defended itself, saying that it could not be prosecuted for a failure to classify *special protection areas* and at the same time for failing to introduce the measures required in those areas. This defence was rejected by the Court at the time and hence came the declaration described above on the applicability of Article 4(4) of the birds directive and the compulsory measures envisaged therein.

99. The legal thinking permeating Community law, whereby a Member State should be unable to draw any benefit from its failure to comply with obligations under Community law, is evident from these authorities. [40] If the Court had followed the logic of the Spanish Government's defence in Case C-355/90, it would have signified for Member States that if they had failed to classify *special protection areas*, they could in any event have been prosecuted for such inactivity. Beyond that, however, they would have found them-

39 — Cases C-355/90 (cited at footnote 34), C-166/97 (cited at footnote 13) and C-96/98 (cited at footnote 16).

40 — Thus, the entire doctrine of direct applicability of Directives is based on this thinking.

selves in a quasi 'lawless' area, in view of which they could not have been prosecuted for the pollution or deterioration of the habitats of species of birds meriting protection.

100. A dilatory approach on the part of Member States in their classification of *special protection areas* would undoubtedly have been promoted, had the Court not ruled in favour of the applicability of Article 4(4), even if there were no SPA classification, yet the Court established a very strict criterion in another context with regard to the deterioration of *special protection areas*.[41] On that occasion, the Court did not allow either economic or recreational requirements to justify encroachments changing the environment,[42] even though the United Kingdom Government, as intervener, had expressly referred to Article 2 of the directive,[43] but allowed only imperative considerations of the public interest which took priority over the environmental concerns of the Directive, such as the aversion of flood risks and coastal protection.[44]

101. It is precisely this initial situation that applies when the Commission talks about a stricter regime under Article 4(4) of the birds directive compared with the obligations arising from Article 6(2) to (4) of the habitats directive, in which economic or social reasons can be taken into consideration in the form of 'imperative reasons of overriding public interest'.

102. The duality of the regime for classified *special protection areas*, on the one hand, and those that should have been classified, on the other, as alluded to by the Commission, may be unproblematic, but it will create a certain incentive for Member States to classify SPAs if they thereby open up the possibility of deviating from the rigid requirements laid down by Article 4(4) of the birds directive (as interpreted by the Court[45]).

103. Neither is it by any means the case that all regions, irrespective of their nature and quality, would be assessed under the stricter requirements laid down by Article 4(4) of the birds directive, simply because they had *not* been classified as SPAs. On the contrary, such sites must be those that *should* have been classified as SPAs. They must be of a particular quality, characterised by a high degree of certainty in terms of their importance to the bird

41 — Cf. judgment in Case C-57/89 *Commission* v *Germany* [1991] ECR I-883.

42 — Cf. also judgments in Case 247/85 *Commission* v *Belgium* [1987] ECR 3029 and Case 262/85 *Commission* v *Italy* [1987] ECR 3073.

43 — Cf. judgment in Case C-57/89 (cited at footnote 41, paragraph 15).

44 — Cf. judgment in Case C-57/89 (cited at footnote 41, paragraphs 22 and 23).

45 — Cf. Cases C-57/89 (cited at footnote 41), 247/85 (cited at footnote 42), 262/85 (cited at footnote 42).

population. In accordance with paragraph 4 of Article 4(1), it must be one of the 'most suitable territories in number and size' for the conservation of the species. When a site qualifies as an area that should have been classified as an SPA, there is associated with this a certain judgment of unworthiness with regard to omissions in the fulfilment of the Member State's obligations under Article 4(1) and (2) of the birds directive. In all other regions, the duty of endeavour embodied in the second sentence of Article 4(4), which reads, 'Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats', continues to apply.

104. As a result of this consideration of the rivalry between Article 4(4) of the birds directive and Article 6(2) to (4) of the habitats directive, it must be stated that Article 6(2) to (4) is not applied by operation of Article 7 of the habitats directive to sites that were not the subject of a formal classification as SPAs or recognised as such. In the present case, therefore, Article 4(4) of the birds directive will continue to apply.

105. Within the framework of the second cause of action, the important element, therefore, is to clarify whether the French authorities infringed their obligations under Community law arising from Article 4(4) of the birds directive, by granting a licence for the extension of the limestone quarry in the communes of Vingrau and Tautavel. Since it is in no way contested that the site was not classified as an SPA in November 1994, it must initially have been a site that should have been classified as an SPA.

106. The territory of the communes of Vingrau and Tautavel lies within the area protected by biotope order No 774/91. In the meantime, this very area was classified as an SPA in January 1999. Against this background, there can be no reservations about regarding the site to which the licence applies as one located in an area that should be classified as an SPA. The duty incumbent on the Member State was and is, therefore, to take appropriate measures 'to avoid pollution or deterioration of habitats or any disturbance affecting the birds, in so far as these would be *significant* having regard to the objectives of this Article.' [46]

107. The Commission quite naturally assumes that the environmental changes associated with the limestone quarrying would lead to such significant deterioration of habitats and disturbance affecting the birds. The French Government, on the other hand, claims that the change is not 'significant' within the meaning of the provision.

46 — Accentuation by the author.

108. The fact is that the provision does not prohibit interference of any sort with the environment, but only those cases that would have a significant impact on the objectives of Article 4. It must not be forgotten in this respect that the bird population can be highly sensitive in its reaction to man's interference with the environment.

109. To be able to assess whether interference is 'significant' within the meaning of the provision, the objectives of Article 4 of the birds directive must be applied. The provision requires special efforts to be made in relation to the habitats of species classified worthy of protection under Annex I to the birds directive. The existence of a few such species in the region, Bonelli's eagle in particular, is undisputed.

110. With regard to the much cited Bonelli's eagle, it should be noted at the outset that the limestone quarry in Tautavel has been operating since 1968. Throughout this time, the Bonelli eagles have repeatedly nested in the crags at Vingrau. The fact that the pair of eagles failed to appear in 1997/98 cannot be connected to the *extension* of the limestone quarry, since those activities had not yet begun at that time.

111. According to the argument presented by the French Government, which has remained uncontested in this respect, the power lines necessary in order to operate the plant were laid underground, so that they did not represent an acute risk to the birds.

112. The extended limestone quarry can be expected to cover an area of 30 hectares, once it is in full operation. In relation to the total area of the biotope protected under order No 774/91 or the present SPA covering 231 hectares, this represents 7.7%. If one relates the 30 hectares of space used to ZICO LR07, which covers an area of 47 400 hectares, the extent of the land in use is once again modified considerably.

113. Nevertheless, the possibility that the quarrying operation will result in noise disturbance and a deterioration in the hunting ground used by the birds of prey cannot be ruled out.

114. In this connection, the French Government has referred to the natural screen specifically approved as a compensatory measure and to measures aimed at increasing the stock of small game for the birds of prey.

115. However, the extent to which such compensatory measures can be taken into

account as part of the examination of Article 4(4) of the birds directive, if indeed at all, is questionable.

116. Unlike Article 4(4) of the birds directive, Article 6(2) to (4) of the habitats directive envisages compensatory measures in the event of the project nevertheless being implemented, despite a negative assessment of the implications for the environment, out of predominantly public interest considerations.

117. Article 4(4) of the birds directive does not in itself make any provision for exceptions. Apart from the priority given in the case-law, as has already been mentioned, to the public interest in the form of measures aimed at protecting human life,[47] no deviations are possible in principle. Irrespective of this, however, the Court took into account in its severe judgment the fact that the project in question had 'specific positive consequences for the habitat of birds'.[48]

118. It may therefore be permissible for certain compensatory measures to be taken into account when examining the significance of the effects. This is because, firstly, the provision contained in Article 4(4) of the birds directive is not to be regarded as an absolute ban on any change. Secondly, the significance of the effects of the project must be seen in its entirety. On this condition, compensatory measures prescribed or suggested by the French authorities may be taken into consideration for the purposes of the overall assessment. If one takes account, therefore, of the erection of the natural screen and its planting with vegetation, the management of meadows, creation of watering places, introduction of small game and increase in existing stocks and the obligation to restore the landscape's original appearance, it is quite possible that the habitat of the resident bird population will not be disturbed to any 'significant' extent. It is therefore proposed that the second cause of action should be rejected.

119. In the event that the Court should choose not to follow the solution outlined above and prefer to proceed on the basis of the applicability of Article 6(2) to (4) of the habitats directive, notwithstanding the reservations pursuant to Article 7 in relation to timing and content, a few considerations to assist in this are set out below.

120. The quarry extension project would then have to satisfy the requirements of this directive. To begin with, it should be pointed out with regard to the conditions formulated in Article 6(2) on the application of the directive, that despite the far-reaching agreement in the formulations of

47 — Cf. Case C-57/89, cited at footnote 41.

48 — Cf. Case C-57/89, cited at footnote 41, paragraph 25.

Article 4(4) of the birds directive and Article 6(2) of the habitats directive, their contents do not concur. Thus, for instance, a 'significant effect' on the objective of Article 4(1) and (2) of the birds directive is not the same as a 'significant effect' on the aims of the habitats directive. Article 4(1) and (2) of the birds directive specifically deals with the protection of certain species of birds, while the aim of the habitats directive must be defined differently and possibly more broadly.[49] Article 6(2) and (3) talk about disturbances that 'could be significant' and of projects that are 'likely to have a significant effect' on an SPA. It goes without saying that the mere possibility of the effect produces more far-reaching obligations for avoidance than cases in which the effect actually materialises. The use of the conditional indicates a broader obligation than that of the indicative in Article 4(4) of the birds directive. Therefore, the considerations set out earlier in relation to the significance of the effects cannot necessarily be transferred to Article 6(2) of the habitats directive.

121. It is entirely possible, or even probable, in this respect that the planned extension of the limestone quarry is a 'project' as defined by Article 6(3) of the habitats directive. This necessarily requires an assessment to be carried out with regard to the likely implications, as also specified in Article 6(3). So that the project can be allowed, despite a negative outcome to the assessment, under the condition of compensatory measures, the grounds for exception indicated in Article 6(4) must be examined beforehand. Economic and social interests can also play a part in this. The Commission must be informed on this.

122. In actual fact, the French authorities arranged for a series of preliminary investigations to be carried out, which concluded that the project was compatible with the environmental goals formulated. Even if the authorities had reached a negative outcome during the initial stages, they would have had to continue in the further course of proceedings under Article 6(4) of the habitats directive.

123. Assuming the French authorities had obtained a negative result from their examination under Article 6(3) of the habitats directive,[50] they would have had the opportunity of implementing the plan or project under Article 6(4) for 'imperative reasons of overriding reasons of public interest, including those of a social or economic nature', in so far as there was no alternative solution at hand. With regard to the alternative solution, the

49 — Cf. Article 2 of the habitats directive.

50 — Even in the pre-litigation proceedings, the French Government insisted that the licences had been granted under conditions that satisfied the requirements of Article 6(3).

French Government declared that this possibility had been examined, but with a negative outcome. The alternative referred to of quarrying the limestone deposit at Salses-Opoul had been viable from the point of view of the quality of the minerals, but not the quantity available.

124. From a procedural point of view, the way was therefore open for the French authorities to advance social and economic grounds. The maintenance or creation of 200 jobs, in view of the region's high unemployment, undoubtedly has a part to play here. The assessment of the individual elements represents a discretionary decision, which can only be examined with regard to its legality and not the appropriateness of its content. The French authorities evidently decided in favour of this process of consideration, without gross defects being evident in this process. The Member State opting to proceed according to Article 6(4) of the habitats directive is, however, obliged to take compensatory measures. The fact that such compensatory measures were adopted has already been referred to in my examination of Article 4(4) of the birds directive.

125. The Commission then claimed it had not been notified of the procedure in the form required under Article 6(4). In that respect, the counter-argument raised by the French Government, to the effect that all studies had been carried out before 10 July 1994, the crucial date on which the habitats directive came into force, is convincing. Having regard to the time when the events took place, one cannot insist on observance of the formal requirements arising from this Directive. What must then be decisive and sufficient is that, as to the substance, the requirements of the habitats directive were taken into account. [51]

126. Therefore, even if there is an affirmative answer to the problems posed by the application of Article 6(2) to (4) of the habitats directive, the second pleas in law cannot lead to the application being upheld.

VI — Costs

127. Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be order to pay the costs. However, the first subparagraph of Article 69(3) provides that the Court may order that the costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads. Since the Commission will only succeed in part of its action, according to the solution proposed here, I propose that each party should bear its own costs.

51 — Cf. Case C-431/92 (cited at footnote 31, paragraphs 42 ff.).

VII — Conclusion

128. I therefore propose that the Court should rule as follows:

(1) The French Republic has failed in its obligations under Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of species of wild birds, in that it has omitted to classify special protection areas as defined by the directive in the area of Basses Corbières.

(2) The remainder of the application is dismissed.

(3) Each party is ordered to bear its own costs.