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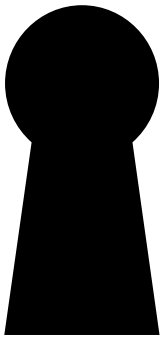
Key extracts

from a selection of judgments of the

European Court of Human Rights

and decisions and reports of the

European Commission of Human Rights



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Directorate General of Human Rights

Directorate General of Human Rights
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Preface

The first application to the European Commission of Human Rights was received in 1955. In over forty years, the Commission has registered more than 40 000 applications. Its published decisions run to around 150 volumes – 46 in the *Collection of decisions* (1960 to 1974) and nearly 100 at the time of writing in *Decisions and reports* (1975 onwards).

The European Court of Human Rights handed down its first judgment (Lawless v. Ireland) in 1961. Its published judgments now fill nearly 400 volumes in *Series A* and its successor, *Reports of judgments and decisions*.

For those studying the case-law of the European Convention on Human Rights, this bulk of material is a resource without parallel. Nevertheless, it is recognised that the volume of the case-law makes it difficult to gain an overview, to disentangle the salient interpretations of the Convention – and, in particular, to have quick access to the original text of passages of judgments containing interpretative statements on the substantive provisions of the Convention and its protocols.

From this mass of case-law, the authors have distilled the essential elements to produce a one-volume guide to the jurisprudence of the Convention and its protocols. In an article-by-article approach focussed on the Court's case-law, they present key passages from the judgments relevant to each article, putting them in context with their own commentary.

The arrangement by article, the extensive extracts from the case-law, the detailed table of contents, and the index give the reader different ways of approaching the book, making it a useful tool for both the newcomer to Convention law and the more experienced researcher. On the eve of the entry into force of Protocol No. 11, this book presents a selection of the key interpretative rulings of the Court since the birth of the Convention.

Pierre-Henri Imbert
Director of Human Rights
July 1998

The published case-law of the European Convention on Human Rights

European Commission of Human Rights

Collection of decisions of the European Commission of Human Rights, Vols. 1-46, 1960-1974, Council of Europe

Decisions and reports (DR), Vols. 1- , 1975- , Council of Europe

European Court of Human Rights

Series A: Judgments and decisions, Vols. 1-338, 1961-1995, Carl Heymanns Verlag, Cologne

Series B: Pleadings, oral arguments and documents, Vols. 1-104, 1961-1995, Carl Heymanns Verlag, Cologne

Reports of judgments and decisions, 1996- , Carl Heymanns Verlag, Cologne

Committee of Ministers

Collection of resolutions adopted by the Committee of Ministers in application of Articles 32 and 54 of the European Convention on Human Rights, 1959-1989, 1993, Council of Europe.

(This collection is updated by means of supplements published at approximately annual intervals.)

Yearbook of the European Convention on Human Rights

Vols. 1- , 1959- , Martinus Nijhoff Publishers, The Hague/London/Boston. Contains selected decisions of the European Commission of Human Rights; summaries of the judgments of the European Court of Human Rights; and the human rights (DH) resolutions of the Committee of Ministers.

Internet

http://hudoc.echr.coe.int/

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Foreword

This collection contains a series of extracts from the judgments of the European Court of Human Rights classified article by article. Where necessary, they are preceded by a brief account of the facts or by a summary of other relevant decisions. This document does not claim to provide an exhaustive presentation of the judgments of the Court. Although extracts from decisions have been included for all the articles of the Convention, only the most important points have been examined in depth.

The decisions cited were chosen as follows:

The leading judgments were not always used. We sometimes preferred to cite other, later, judgments, either because:

- they contained a summary of previous important decisions; or
- they were formulated more fully or more precisely than the original leading case; or
- they were very recent and actually upheld the case-law of the Court; or, finally,
- the facts of the later case were more typical.

In any event, irrespective of the decisions actually chosen, we believe that we have reflected the substance of the case-law of the Court. Furthermore, the extracts cited often contain references to other important judgments which the reader will be free to consult. Lastly, decisions and reports of the Commission have been used where there was no relevant judgment of the Court.

We hope that this document will allow the case-law concerning the European Convention on Human Rights to reach a wider audience. The judicial decisions have a fundamental role: they define the scope and content of the provisions of the Convention and the protocols thereto.

Gilles Dutertre
Jakob van der Velde

Part I
The European Convention on Human Rights

Article 1 ECHR – Obligation to respect human rights

Article 1 is worded as follows:

> **The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.**

By this first article the European Convention on Human Rights (ECHR) defines the field of application of its first section. It applies to "everyone", providing they fall "within [the] jurisdiction" of a Contracting State.

1. The Convention applies to "everyone"

It follows from Article 1 that the Contracting States must ensure that the rights and freedoms of the European Convention on Human Rights are enjoyed by "everyone", without any restriction whatsoever. Consequently, the age, race, capacity or nationality of the persons concerned is irrelevant.

However, in the Lithgow v. the United Kingdom case (8 July 1986, Series A no. 102, p. 48, para. 116), the Court stated that:

> As to Article 1 of the Convention, it is true that under most provisions of the Convention and its Protocols nationals and non-nationals enjoy the same protection but this does not exclude exceptions as far as this may be indicated in a particular text (see e.g. Articles 5 (1) (*f*) and 16 of the Convention and 3 and 4 of Protocol No. 4).

2. The Convention applies to everyone within the "jurisdiction of the states"

Article 1 defines the link which must exist between a person and a member state in order for the Convention to apply. The person in question must come within the jurisdiction of the relevant member state. However, the concept of "jurisdiction" is not limited to territorial competence: it covers every situation where a person comes within the jurisdiction of a state. In the Loizidou v. Turkey judgment of 23 March 1995 (Preliminary Objections) (Series A no. 310, pp. 23-24, para. 62), the Court gave a summary of the concept of "jurisdiction":

> In this respect the Court recalls that, although Article 1 sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. According to its case-law, for example, the Court has held that the extradition or expulsion of a person may give rise to an issue under Article 3, and hence engage the responsibility of that state under the Convention (see the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, pp. 35-36, para. 91; the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 28, paras. 69 and 70; and the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 34, para. 103). In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory (see the Drozd and Janousek v. France and Spain judgment of 26 June 1992, Series A no. 240, p. 29, para. 91).

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

In the case of Loizidou v. Turkey the applicant, living in southern Cyprus, complains about the denial of access to and interference with her property rights in northern Cyprus since the Turkish occupation of northern Cyprus.

With regard to the imputability issue the Court considered in the Loizidou judgment concerning the merits (18 December 1996, Reports of Judgments and Decisions 1996-VI, pp. 2235-2236, paras. 54, 56):

> It is important for the Court's assessment of the imputability issue that the Turkish Government have acknowledged that the applicant's loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops and the establishment there of the "TRNC" (Turkish Republic of Northern Cyprus) (see the above-mentioned preliminary objections judgment, p. 24, para. 63). Furthermore, it has not been disputed that the applicant has on several occasions been prevented by Turkish troops from gaining access to her property (see paragraphs 12-13 above).
>
> However, throughout the proceedings the Turkish Government have denied state responsibility for the matter complained of, maintaining that its armed forces are acting exclusively in conjunction with and on behalf of the allegedly independent and autonomous "TRNC" authorities.
>
> [...]
>
> It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in northern Cyprus (see paragraph 16 above) that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the "TRNC" (see paragraph 52 above). Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention. Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.
>
> In view of this conclusion the Court need not pronounce itself on the arguments which have been adduced by those appearing before it concerning the alleged lawfulness or unlawfulness under international law of Turkey's military intervention in the island in 1974, since, as noted above, the establishment of state responsibility under the Convention does not require such an enquiry (see paragraph 52 above). It suffices to recall in this context its finding that the international community considers that the Republic of Cyprus is the sole legitimate Government of the island and has consistently refused to accept the legitimacy of the "TRNC" as a state within the meaning of international law (see paragraph 44 above).

Article 2 ECHR – The right to life

Article 2 para. 1

Article 2 para. 1 is worded as follows:

> 1. **Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.**

1. The spirit of Article 2

In the case of McCann and Others v. the United Kingdom (27 September 1995 Series A no. 324, paras. 146, 147) the Court stated the following approach to the interpretation of Article 2.

> The Court's approach to the interpretation of Article 2 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, *inter alia*, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 34, para. 87, and the Loizidou v. Turkey (Preliminary objections) judgment of 23 March 1995, Series A no. 310, p. 27, para. 72).
>
> It must also be borne in mind that, as a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 ranks as one of the most fundamental provisions in the Convention – indeed one which, in peacetime, admits of no derogation under Article 15. Together with Article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe (see the above mentioned Soering v. the United Kingdom judgment, p. 34, para. 88). As such, its provisions must be strictly construed.

2. The implications of Article 2 para. 1

Threats to life

The first consequence of this provision (which must be read in conjunction with Protocol No. 6, cited in Part 2) is that each state must ensure that its criminal law protects the life of individuals.

Abortion

In addition to this very clear principle there is also the question of the protection of life before birth. In the Open Door and Dublin Well Woman v. Ireland case (29 October 1992, Series A no. 246-A, p. 28, para. 66) two organisations had been prohibited from imparting information concerning abortion facilities outside Irish territory to pregnant women. Abortion is prohibited in Ireland. In that regard, the Court held:

> that in the present case it is not called upon to examine whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2. The applicants have not claimed that the Convention contains a right to abortion, as such, their complaint being limited to that part of the injunction which restricts their right to impart and receive information concerning abortion abroad (see paragraph 20 above).

Thus the Court did not adopt a position on the question of abortion from the aspect of Article 2. The question remains open. However, the Commission has had occasion to deal with the subject. In the X v. the United Kingdom case the Commission stated (Application No. 8416/79, Decision of 13 May 1980, DR 19, p. 248, para. 4, and p. 253, para. 23):

> The Commission, therefore, has to examine whether this application discloses any appearance of a violation of the provisions of the Convention invoked by the applicant, in particular Articles 2 and 8. It

> here recalls that the abortion law of High Contracting parties to the Convention has so far been the subject of several applications under Article 25. The applicants either alleged that the legislation concerned violated the (unborn child's) right to life (Article 2) or they claimed that in constituted an unjustified interference with the (parents') right to respect for private life (Article 8). Two applications invoking Article 2 were declared inadmissible by the Commission on the ground that the applicants – in the absence of any measure of abortion affecting them by reason of a close link with the foetus – could not claim to be "victims" of the abortion laws complained of (Application No. 867/60, X v. Norway, Collection 6, Yearbook 4, 270, and Application No. 7045/75, X v. Austria, Decisions and Reports 7, 87). One application (No. 6959/75 – Brüggemann and Scheuten v. the Federal Republic of Germany), invoking Article 8, was declared admissible by the Commission, in so far as it had been brought by two women. The Commission, and subsequently the Committee of Ministers, concluded that there was no breach of Article 8 (Decisions and Reports 10, 100-122). That conclusion was based on an interpretation of Article 8 which, *inter alia*, took into account the High Contracting Parties' law on abortion as applied at the time when the Convention entered into force (*ibid*. p. 117, para. 64 of the Commission's Report).

After summing up the precedents, the Commission puts forward a cautious response based essentially on the necessity of protecting the mother's life which abortion might ensure:

> The Commission considers that it is not in these circumstances called upon to decide whether Article 2 does not cover the foetus at all or whether it recognises a "right to life" of the foetus with implied limitations. It finds that the authorisation, by the United Kingdom authorities, of the abortion complained of is compatible with Article 2 (1), first sentence, because, if one assumes that this provision applies at the initial stage of the pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the "right to life" of the foetus.

In the case of H. v. Norway (Application No. 17004/90, Decision of 19 May 1992, DR 73, p. 155) the Commission did accept the possibility that the question might arise of protecting the life of the foetus in the context of Article 2.

The Commission stated that in the delicate area of abortion the Contracting States must have a certain discretion. The Commission did not exclude that in certain circumstances it may have to decide whether the foetus may enjoy a certain protection under Article 2, notwithstanding that there is in the Contracting States a considerable divergence of views on whether or to what extent Article 2 protects the unborn life. The complaint of the father about the lack of protection of the life of the unborn child under Norwegian law was declared inadmissible.

Article 2 para. 2

Article 2 para. 2 is worded as follows:

> **2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:**
>
> **a in defence of any person from unlawful violence;**
>
> **b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;**
>
> **c in action lawfully taken for the purpose of quelling a riot or insurrection.**

1. Cases where the conditions for derogation must be satisfied

In the case of McCann and Others v. the United Kingdom (27 September 1995, Series A no. 324, para. 148) three members of the IRA (Irish Republican Army) suspected of involvement in a bombing mission were killed by members of the security forces of the United Kingdom. The Court provided valuable information concerning the scope of Article 2 and thus the situation in which the conditions in paragraph 2 of that Article must be satisfied.

> The Court considers that the exceptions delineated in paragraph 2 indicate that this provision extends to, but is not concerned exclusively with, intentional killing. As the Commission has pointed out, the text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (*a*), (*b*) or (*c*) (see Application No. 10444/82, Stewart v. the United Kingdom, 10 July 1984, Decisions and Reports, volume 39, pp. 169-171).

2. The notion of "absolute necessity" in the use of force

In the same judgment, the Court also described the notion of "absolute necessity" (para. 149) and its assessment of the use of force under this Article, (para. 150):

> In this respect the use of the term "absolutely necessary" in Article 2 para. 2 indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether state action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (*a*), (*b*) and (*c*) of Article 2.
>
> In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of liberty to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the state who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.

Having regard to the circumstances of the case the Court finds that there has been a breach of Article 2 of the Convention.

Article 3 ECHR – The prohibition of torture

Article 3 is worded as follows:

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

1. Scope and notions

Scope of Article 3

Article 3 is absolute in scope. This was made clear in the Ireland v. the United Kingdom case (18 January 1978, Series A no. 25, p. 65, para. 163):

> The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and, under Article 15 para. 2, there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation.

Furthermore, Article 3 may be applicable even in the event of a mere threat to use inhuman treatment, that is prior to any actual use of such treatment. Although in the Campbell and Cosans v. the United Kingdom case (25 February 1982, Series A no. 48, pp. 13-14, para. 30) the Court considered that the threat of corporal punishment at school did not create a degree of humiliation or degradation sufficient to reach the threshold necessary for a violation of Article 3.

The Court has applied Article 3 in cases where there are justified and serious reasons to believe that a person is in real danger of being subjected to torture or inhuman or degrading treatment or punishment. Thus, it considered in the Soering v. the United Kingdom case (7 July 1989, Series A no. 161, p. 39, paras. 98-99), on the other hand, that the threat hanging over the applicant was such that it could lead to a violation of that article. The case concerned extradition to a country (the United States, in particular Virginia) where the applicant might possibly have had to await carrying out of the death penalty in harsh conditions on what is known as "death row". The Commonwealth's Attorney of Virginia had himself decided to seek and persist in seeking the death penalty because the evidence supported such action. The Court observed (p. 39, paras. 98 and 99):

> If the national authority with responsibility for prosecuting the offence takes such a firm stance, it is hardly open to the Court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the "death row phenomenon".

Notions contained in Article 3

By their very essence the notions used in Article 3 are relative. The B. v. France judgment (25 March 1992, Series A no. 232-C, p. 87, para. 83) is not the leading case, but it is a more recent decision which sets out those notions as defined by the Court:

> in order to constitute a violation of Article 3 the treatment in question must attain a minimum degree of severity. Appraisal of this minimum degree is by its very essence relative; it depends on all the circumstances of the case, and in particular the nature and context, and the duration of the treatment, its physical or mental effects and, sometimes, the sex, age and state of health of the person concerned (Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 162, and Tyrer v. the United Kingdom judgment of 25 April 1978, Series A no. 26, pp. 14-15, paras. 29-30).
>
> The Court in one case considered the treatment both "inhuman", because it had been applied with premeditation and for hours at a stretch, and had caused "if not actual bodily injury, at least intense physical and mental suffering", and "degrading" because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (Ireland v. the United Kingdom judgment, *loc. cit*., p. 66, para. 167, and Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 39, para. 100).

In addition to these definitions of inhuman treatment and degrading treatment, it is necessary to mention the definition of torture already provided in the Ireland v. the United Kingdom case (18 January 1978, Series A no. 25, p. 66, para. 167):

> The Court considers [...] that, whilst there exists on the one hand violence which [...] does not fall within [...] the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

In the Aksoy v. Turkey judgment (18 December 1996, Reports of Judgments and Decisions 1996-VI, p. 2279, para. 64) the Court concluded for the first time that the treatment of the applicant could "only be described as torture".

> The Court recalls that the Commission found *inter alia* that the applicant was subjected to "Palestinian hanging", in other words, that he was stripped naked, with his arms tied together behind his back, and suspended by his arms.
>
> In the view of the Court this treatment could only have been deliberately inflicted; indeed a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions of information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time (see paragraph 23 above). The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture.

2. Application

Article 3 applies in numerous situations; the following are some examples.

Physical ill-treatment, inhuman treatment and police procedures

There is a violation of Article 3 where blows are inflicted on a person held in police custody and "no one has claimed that the marks noted on the applicants' body could have dated from a period prior to his being taken into custody or could have originated in an act carried out by the applicant against himself or again as a result of an escape attempt" (Tomasi v. France, 27 August 1992, Series A no. 241-A, p. 40-42, paras. 110, 115). This judgment established the Court's attitude regarding persons who are the subject of police investigations. The Court observed that it does not have to:

> examine the system of police custody in France and the rules pertaining thereto, or, in this case, the length and the timing of the applicant's interrogations. It finds it sufficient to observe that the medical certificates and reports, drawn up in total independence by medical practitioners, attest to the large number of blows inflicted on Mr Tomasi and their intensity; these are two elements which are sufficiently serious to render such treatment inhuman and degrading. The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals.

But the Court has not seen a violation of Article 3 in every case where there are traces of physical injury. In the case of Klaas v. Germany, judgment of 22 September 1993, Series A no. 269, p. 17-18, para. 30, the Court observed that "the admitted injuries sustained by the [...] applicant were consistent with either her or the police officer's version of the events". In this case no violation of Article 3 could be found to have occurred. In these circumstances the Court considered:

> No material has been adduced in the course of the Strasbourg proceedings which could call into question the findings of the national courts and add weight to the applicant's allegations either before the Commission or the Court.

As one can see, all depends on the question of proof. The cause of the injury must be established. The Klass case again:

> The Court would distinguish the present case from that of Tomasi v. France (cited above) where certain inferences could be made from the fact that Mr Tomasi had sustained unexplained injuries during forty-eight hours spent in police custody.
>
> No cogent elements have been provided which could lead the Court to depart from the findings of fact of the national courts.

On the other hand in the case of Ribitsch v. Austria, judgment of 4 December 1995, Series A no. 336, paras. 34-38, the Court concluded "that the Government have not satisfactorily established that the applicant's injuries were caused otherwise than – entirely, mainly or partly – by the treatment he underwent while in police custody". The applicant had bruises on the inside and outside of his right arm. The Government did no more than refer to the outcome of the domestic criminal proceedings. The Court found the explanation of the Government that the injuries were caused by a fall against a car door unconvincing. Furthermore, the Court emphasised that:

> in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention.

Inhuman treatment and corporal punishment

The Court also reached the conclusion that judicial corporal punishment inflicted on a juvenile delinquent – i.e. three strokes of the birch – amounted to degrading punishment within the meaning of Article 3 (Tyrer v. the United Kingdom case, 25 April 1978, Series A no. 26). However, the threat of the use of corporal punishment as a disciplinary measure in school was not sufficient to amount to degrading treatment (Campbell and Cosans v. the United Kingdom, 25 February 1982, Series A no. 48). The Court reached also the conclusion that the "disciplinary sanction" for a 7-year-old boy consisting of three "whacks" on the bottom through his shorts with a rubber-soled gym shoe by the headmaster did not attain the minimum level of severity to fall within the ambit of Article 3 (Costello-Roberts v. the United Kingdom, 25 March 1993, Series A no. 247-C).

Inhuman or degrading treatment and psychiatric patients

With regard to medical treatment given to a person detained in a psychiatric hospital the Court gave some useful guidelines in the Herczegfalvy v. Austria judgment, 24 September 1992, Series A no. 244, pp. 25-26, para. 82):

> The Court considers that the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with. While it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3, whose requirements permit no derogation.
>
> The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist.

Degrading treatment and the lack of respect for the personality

A difference of treatment which denotes contempt or lack of respect for the personality of the person concerned and is designed to humiliate or debase him or her (Abdulaziz, Cabales and Balkandali v. the United Kingdom case, 28 May 1985, Series A no. 94) may constitute a violation of Article 3.

Inhuman or degrading treatment and extradition

Here we return to the above-mentioned Soering case and the "death row" question; however, this time the purpose is not to show that Article 3 is called into play in the event of a risk of inhuman treatment

but to show that it applies in extradition proceedings even where the applicant country in which the threat of inhuman treatment exists is not a party to the Convention. In the Soering case the applicant country was the United States of America. The Court considered (7 July 1989, Series A no. 161, pp. 35, 44 and 45, paras. 91, 111) that:

> the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that state under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.
>
> [...]
>
> having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.
>
> [...]
>
> Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3.

In the Cruz Varas and Others v. Sweden judgment (20 March 1991, Series A no. 201, p. 28, para. 70) the Court held that these principles also apply to expulsion decisions. The Court made it clear in the judgment of D. v. the United Kingdom (2 May 1997, Reports of Judgments and Decisions 1997-III, p. 791, paras. 46-50) that the responsibility of the Contracting States is also engaged when the alleged ill-treatment does not directly or indirectly emanate from the public authorities of the receiving country.

> The Court recalls at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. It also notes the gravity of the offence which was committed by the applicant and is acutely aware of the problems confronting Contracting States in their efforts to combat the harm caused to their societies through the supply of drugs from abroad. The administration of severe sanctions to persons involved in drug trafficking, including expulsion of alien drug couriers like the applicant, is a justified response to this scourge.
>
> However, in exercising their right to expel such aliens Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies. It is precisely for this reason that the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question (see, most recently, the Ahmed v. Austria judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, p. 2206, para. 38; and the Chahal v. the United Kingdom judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, p. 1853, paras. 73-74).
>
> The Court observes that the above principle is applicable to the applicant's removal under the Immigration Act 1971. Regardless of whether or not he ever entered the United Kingdom in the technical sense (see paragraph 25 above) it is to be noted that he has been physically present there and thus within the jurisdiction of the respondent state within the meaning of Article 1 of the Convention since

> 21 January 1993. It is for the respondent state therefore to secure to the applicant the rights guaranteed under Article 3 irrespective of the gravity of the offence which he committed.
>
> It is true that this principle has so far been applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-state bodies in that country when the authorities there are unable to afford him appropriate protection (see, for example, the Ahmed v. Austria judgment, *loc. cit*., p. 2207, para. 44).
>
> Aside from these situations and given the fundamental importance of Article 3 in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that article in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling state.
>
> Against this background the Court will determine whether there is a real risk that the applicant's removal would be contrary to the standards of Article 3 in view of his present medical condition. In so doing the Court will assess the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on his state of health (see the Ahmed v. Austria judgment, *loc. cit.*, p. 2207, para. 43).

In this case the applicant was diagnosed as HIV-positive and suffered from AIDS. The Government proposed to remove the applicant, who served a prison sentence for drug trafficking, to St Kitts. In the judgment the Court notes "that the applicant is in the advanced stages of a terminal and incurable illness" and that "it is not disputed that his removal will hasten his death". "There is a serious danger that the conditions of adversity which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering" (paras. 51-54).

> In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3.
>
> The Court also notes in this respect that the respondent State has assumed responsibility for treating the applicant's condition since August 1994. He has become reliant on the medical and palliative care which he is at present receiving and is no doubt psychologically prepared for death in an environment which is both familiar and compassionate. Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3, his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment.
>
> Without calling into question the good faith of the undertaking given to the Court by the Government (see paragraph 44 above), it is to be noted that the above considerations must be seen as wider in scope than the question whether or not the applicant is fit to travel back to St Kitts.
>
> Against this background the Court emphasises that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain on the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison.
>
> However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3.

Article 4 ECHR – Prohibition of slavery and forced labour

Article 4 para. 1

Article 4 para. 1 is worded as follows:

> **1. No one shall be held in slavery or servitude.**

1. Notion of slavery

The Van Droogenbroeck v. Belgium case (24 June 1982, Series A no. 50, p. 32, para. 58) serves to indicate the meaning of "servitude". In that case the applicant had been convicted of theft and ordered to be placed at the Government's disposal for ten years. Before the Court he complained that being placed at the Government's disposal amounted to being held in servitude, contrary to Article 4 para. 1. The Court observed:

> The situation complained of did not violate Article 5 para. 1 (see paragraph 42 above). Accordingly, it could have been regarded as servitude only if it involved a "particularly serious" form of "denial of freedom" (see paragraphs 79-80 of the Commission's report), which was not so in the present case.

2. Slavery and the question of consent

The Commission dealt with the case of young British citizens who, while minors, had joined the British army or naval services for a period of nine years. The army or naval authorities refused to grant their applications for discharge. They brought proceedings before the Commission on the ground that this constituted a form of servitude in the light of their young age at the time of joining the armed services. After consenting to examine whether military service constituted a form of servitude, the members of the Commission found that this was not so in the instant case (W, X, Y and Z v. the United Kingdom case; Applications Nos. 3435-3438/67; D. 27.398, 06.2/31; pp. 20 and 21):

> the Commission is of the opinion that "servitude" and "forced or compulsory labour" are distinguished in Article 4 and, although they must in fact often overlap, they cannot be treated as equivalent, and that the clause excluding military service expressly from the scope of the term "forced or compulsory labour" does not forcibly exclude such service in all circumstances from an examination in the light of the prohibition directed against "slavery or servitude";
>
> [...]
>
> whereas consequently the terms of service if not amounting to a state of servitude for adult servicemen, can neither have that character for boys who enter the services with their parents' consent.

Article 4 para. 2

Article 4 para. 2 is worded as follows:

> **2. No one shall be required to perform forced or compulsory labour.**

The Court has had the opportunity to interpret the notion of "compulsory labour". In the Van der Mussele v. Belgium judgment (23 November 1983, Series A No. 70, p. 16, para. 32) the Court considered:

> Article 4 does not define what is meant by "forced or compulsory labour" and no guidance on this point is to be found in the various Council of Europe documents relating to the preparatory work of the European Convention.

> As the Commission and the Government pointed out, it is evident that the authors of the European Convention – following the example of the authors of Article 8 of the draft International Covenant on Civil and Political Rights – based themselves, to a large extent, on an earlier treaty of the International Labour Organisation, namely Convention No. 29 concerning Forced or Compulsory Labour.
>
> [...]
>
> The Court will nevertheless take into account the above- mentioned ILO Conventions – which are binding on nearly all the member States of the Council of Europe, including Belgium – and especially Convention No. 29. There is in fact a striking similarity, which is not accidental, between paragraph 3 of Article 4 of the European Convention and paragraph 2 of Article 2 of Convention No. 29. Paragraph 1 of the last-mentioned Article provides that "for the purposes" of the latter Convention, the term "forced or compulsory labour" shall mean "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". This definition can provide a starting-point for interpretation of Article 4 of the Convention. However, sight should not be lost of that Convention's special features or of the fact that it is a living instrument to be read "in the light of the notions currently prevailing in democratic States" (see, *inter alia*, the Guzzardi judgment of 6 November 1980, Series A no. 39, p. 34, para. 95).

In the judgment it is made clear that work which an individual was required to do within the framework of a freely-chosen profession does not necessarily constitute compulsory labour. The Court observed (p. 21, para. 40 of the judgment):

> The Court would recall that Mr Van der Mussele had voluntarily entered the profession of *avocat* with knowledge of the practice complained of. This being so, a considerable and unreasonable imbalance between the aim pursued – to qualify as an *avocat* – and the obligations undertaken in order to achieve that aim would alone be capable of warranting the conclusion that the services exacted of Mr Van der Mussele in relation to legal aid were compulsory despite his consent. No such imbalance is disclosed by the evidence before the Court, notwithstanding the lack of remuneration and of reimbursement of expenses – which in itself is far from satisfactory.
>
> Having regard, furthermore, to the standards still generally obtaining in Belgium and in other democratic societies, there was thus no compulsory labour for the purposes of Article 4 para. 2 of the Convention.

In the Van Droogenbroeck v. Belgium case, on the other hand (24 June 1982, Series A no. 50, p. 33, para. 59), where a prisoner had been induced to work to save up the amount set as a condition of his release, the Court observed that

> In practice, once release is conditional on the possession of savings from pay for work done in prison (see paragraphs 13, 16 and 17 above), one is not far away from an obligation in the strict sense of the term.

Article 4 para. 3

Article 4 para. 3 is worded as follows:

> **3. For the purpose of this article the term "forced or compulsory labour" shall not include:**
>
> **a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;**
>
> **b. any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;**
>
> **c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;**
>
> **d. any work or service which forms part of normal civic obligations.**

1. Compulsory labour imposed on detained persons under Article 5

The Court gave a very useful indication of the circumstances in which compulsory labour is permissible when it considered the effect which the observance of Article 5 had on the lawfulness of compulsory labour. In the De Wilde, Ooms and Versyp v. Belgium case the applicants had been detained and required to do paid work. Although the Court found (18 June 1971, Series A no. 12, p. 44, para. 89) that there had been a violation of Article 5 para. 4, it did not conclude that this led to a violation of Article 4. The reason was that Article 5 para. 1 had been observed. The Court

> has, in these cases, found a violation of the rights guaranteed by Article 5 (4) (see paragraphs 74 to 80 above), but [...] does not think that it must deduce therefrom a violation of Article 4. It in fact considers that paragraph 3 (*a*) of Article 4 authorises work ordinarily required of individuals deprived of their liberty under Article 5 (1) (*e*).

2. Civilian work: civil obligations and compulsory payments

In the case of Karlheinz-Schmidt v. Germany (18 July 1994, Series A no. 291-B, p. 32, para. 23) a complaint was made about the obligation imposed solely on men to serve in the fire brigade or pay a financial contribution in lieu.

> the Court considers that compulsory fire service such as exists in Baden-Württemberg is one of the "normal civic obligations" envisaged in Article 4 para. 3 (*d*). It observes further that the financial contribution which is payable – in lieu of service – is, according to the Federal Constitutional Court (see paragraph 15 above), a "compensatory charge". The Court therefore concludes that, on account of its close links with the obligation to serve, the obligation to pay also falls within the scope of Article 4 para. 3 (*d*).

With regard to the compliance of the obligation to serve in the fire brigade or pay a financial contribution in lieu with Article 14 taken in conjunction with Article 4 para. 3 (*d*) of the Convention see under Article 14: Discriminatory differences in treatment.

Article 5 ECHR – The right to liberty and security of person

Article 5 para. 1

Article 5 para. 1 of the Convention is worded as follows:

> **1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:**
>
> **a. the lawful detention of a person after conviction by a competent court;**
>
> **b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;**
>
> **c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;**
>
> **d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;**
>
> **e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;**
>
> **f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.**

1. The notion of deprivation of liberty

In the Guzzardi v. Italy judgment (6 November 1980, Series A no. 39, p. 33-35, paras. 92, 93, 95) the Court turned its attention to the distinction between restriction upon and deprivation of liberty, only the second of which falls within the scope of Article 5 para. 1. In that case Mr Guzzardi had been ordered to reside on a small Italian island in circumstances which, taken together, "[raised] an issue of categorisation from the viewpoint of Article 5". Indeed, the question arises whether this is a case of deprivation of liberty, even though there is no confinement involved. The Court observed:

> The Court recalls that in proclaiming the "right to liberty", paragraph 1 of Article 5 is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 [...] In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see the Engel and others judgment of 8 June 1976, Series A no. 22, p. 24, paras. 58-59).
>
> The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends.
>
> [...]
>
> Whilst the area around which the applicant could move far exceeded the dimensions of a cell and was not bounded by any physical barrier, it covered no more than a tiny fraction of an island to which access was difficult and about nine-tenths of which was occupied by a prison. Mr Guzzardi was housed in part of the hamlet of Cala Reale which consisted mainly of the buildings of a former medical establishment which

> were in a state of disrepair or even dilapidation, a *carabinieri* station, a school and a chapel. He lived there principally in the company of other persons subjected to the same measure and of policemen.
>
> [...]
>
> The Court considers on balance that the present case is to be regarded as one involving deprivation of liberty.

The Court therefore assesses the particular case before it. In another case it held that confining soldiers to their dwellings or to military buildings or premises was not a deprivation of liberty (Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22). In the Nielsen v. Denmark case the Court considered that the hospitalisation in a child psychiatric ward of a minor at the request of the mother did not amount to a deprivation of liberty within the meaning of Article 5, but was a responsible exercise of the mother of her custodial rights in the interest of the child (Nielsen v. Denmark, 28 November 1988, Series A no. 144). On the other hand, the fact that an individual voluntarily surrenders to the authorities and agrees to be detained does not exempt those authorities from complying with Article 5 (De Wilde, Ooms and Versyp v. Belgium judgment of 28 May 1970, Series A no. 12).

With regard to the holding of asylum-seekers in the transit or international zone at, in this case, Paris-Orly airport, the Court considered in the Amuur v. France judgment (25 June 1996, Reports of Judgments and Decisions 1996-III, pp. 847-848, paras. 41, 43):

> The Court notes in the first place that in the fourth paragraph of the Preamble to its Constitution of 27 October 1946 (incorporated into that of 4 October 1958), France enunciated the right to asylum in "the territories of the Republic" for "everyone persecuted on account of his action in the cause of freedom". France is also party to the 1951 Geneva Convention Relating to the Status of Refugees, Article 1 of which defines the term "refugee" as: "Any person who [has a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".
>
> The Court also notes that many member states of the Council of Europe have been confronted for a number of years now with an increasing flow of asylum-seekers. It is aware of the difficulties involved in the reception of asylum-seekers at most large European airports and in the processing of their applications. The report of the Parliamentary Assembly of the Council of Europe of 12 September 1991, is revealing on this point (see paragraph 26 above).
>
> Contracting States have the undeniable sovereign right to control aliens' entry into and residence in their territory. The Court emphasises, however, that this right must be exercised in accordance with the provisions of the Convention, including Article 5.
>
> [...] (see the consideration in the Guzzardi v. Italy judgment as quoted above).
>
> Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable states to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to get round immigration restrictions must not deprive asylum-seekers of the protection afforded by these Conventions.
>
> Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty – inevitable with a view to organising the practical details of the aliens' repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered – into a deprivation of liberty. In that connection account should be taken of the fact that the measure is applicable not to those who have committed criminal offence but to aliens who, often fearing for their lives, have fled from their own country.

> Although by the force of circumstances the decision to order holding must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the courts, the traditional guardians of personal liberties. Above all, such confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status.

The French Government and the Commission shared the opinon in this case that there was no deprivation of liberty attaching "particular weight to the fact that the applicants could at any time have removed themselves form the sphere of application of the measure in issue". However, the Court held:

> The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention. Furthermore, the possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in (para. 48).

In this case the Court concluded "that the holding of the applicants in the transit zone of Paris-Orly Airport was equivalent in practice, in view of the restrictions suffered, to a deprivation of liberty". The applicants, who arrived on 9 March 1992, were held in the airport's transit zone for twenty days, were left to their own devices, were placed under strict and constant police surveillance and had no legal and social assistance. The Court noted also that "until 26 March neither the length nor the necessity of their confinement were reviewed by a court".

2. The cases of deprivation of liberty authorised by the Convention

General points

These cases are exhaustively listed in paragraph 1 and must therefore be applied restrictively. The exceptions in paragraph 1 of Article 5 must be interpreted strictly.

In the Ciulla v. Italy judgment of 22 February 1989, Series A no. 148, p. 18, para. 41, the Court stated:

> the Court does not underestimate the importance of Italy's struggle against organised crime, but it observes that the exhaustive list of permissible exceptions in paragraph 1 of Article 5 of the Convention must be interpreted strictly (see, as the most recent authority, the Bouamar judgment of 29 February 1988, Series A no. 129, p. 19, para. 43).

It is clear that detention is lawful under the Convention only where it is consistent with the specific aims set out in paragraph 1 or, in other words, where the stated purpose of the detention continues to obtain. Thus, for example, in the Quinn v. France case (22 March 1995, Series A no. 311, p. 19, para. 48) the Court stated in connection with sub-paragraph (*f*):

> It is clear from the wording of both the French and the English versions of Article 5 para. 1 (*f*) that deprivation of liberty under this sub-paragraph will be justified only for as long as extradition proceedings are being conducted. It follows that if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified under Article 5 para. 1 (*f*).

The Court ascertains whether the authorities have acted in bad faith, etc., in making use of the opportunities for detention available under Article 5. Thus in the Kemmache v. France No. 3 judgment (24 November 1994, Series A no. 296-C, p. 89, para. 45) it expressly stated that the decisions concerning the applicant's provisional detention:

> disclose neither abuse of authority nor bad faith nor arbitrariness.

In other cases, however, the Court has on occasion found that the detention was not lawful. On this subject, we may cite the Bozano v. France judgment. The case involved a person sentenced in Italy but resident in France. Extradition procedures had met with refusal on the part of the French authorities. The applicant was subsequently arrested in France and expelled to Switzerland, eventually to arrive in Italy where he served his sentence. The complaint concerned the temporary detention in France.

The Court indicates first of all that the requirement of "lawfulness" imposed by Article 5 in cases of detention is essentially covered by the rules applied at national level covering the various types of deprivation of liberty dealt with under this article.

But it makes it clear that the concept of "lawfulness" depends also on the existence of good faith concerning the intention invoked and authorised by Article 5. What is arbitrary – for instance, where the regulations are evaded or bent – is unlawful. So in the Bozano judgment (18 December 1986, Series A no. 111, p. 23 para. 54 and p. 26 para. 60) the Court stated:

> the main issue to be determined is whether the dispute was "lawful", including whether it was in accordance with "a procedure prescribed by law". The Convention here refers essentially to national law and establishes the need to apply its rules, but it also requires that any measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness (see, as the most recent authority, the Ashingdane judgment of 28 May 1985, Series A no. 93, p. 21, para. 44). What is at stake here is not only the "right to liberty" but also the "right to security of person".
>
> [...]
>
> Viewing the circumstances of the case as a whole and having regard to the volume of material pointing in the same direction, the Court consequently concludes that the applicant's deprivation of liberty in the night of 26 to 27 October 1975 was neither "lawful" within the meaning of Article 5 para. 1 (*f*), nor compatible with the "right to security of person". Depriving Mr Bozano of his liberty in this way amounted in fact to a disguised form of extradition designed to circumvent the negative ruling of 15 May 1979 by the Indictment Division of the Limoges Court of Appeal, and not to "detention" necessary in the ordinary course of "action [...] taken with a view to deportation".

In addition to the continuation of the stated purpose of detention, Article 5 para. 1 states *inter alia* that no one shall be deprived of his liberty "in accordance with a procedure prescribed by law". With regard to the words "a procedure prescribed by law" the Court considered in the Benham v. the United Kingdom judgment (10 June 1996, Reports of Judgments and Decisions 1996-III, p. 765, paras. 40-42):

> The Convention here essentially refers back to national law and states the obligation to conform to the substantive and procedural rules thereof, but it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness (see the Quinn v. France judgment of 22 March 1995, Series A no. 311, p. 18, para. 47).
>
> It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 para. 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with (see the Bouamar v. Belgium judgment of 29 February 1988, Series A no. 129, p. 21, para. 49).
>
> A period of detention will in principle be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. For this reason, the Strasbourg organs have consistently refused to uphold applications from persons convicted of criminal offences who complain that their convictions or sentences were found by the appellate courts to have been based on errors of fact or law (see the Bozano v. France judgment of 18 December 1986, Series A no. 111, p. 23, para. 55 and the report of the Commission of 9 March 1978 on Application No. 7629/76, Krzycki v. the Federal Republic of Germany, DR 13, pp. 60-61).

The cases of deprivation of liberty

Article 5 para. 1 (a) – Detention possible after sentencing by a court

The aforementioned Bozano v. France judgment (18 December 1986, Series A no. 111, p. 22, 23, para. 53) provides also an example of the Court's interpretation of the expression "detention [...] *after* conviction". The Court observed that:

> the impugned forcible removal was effected "after" the aforementioned conviction only in a chronological sense. In the context of Article 5 para. 1 (*a*), however, the preposition "after" denotes a causal link in addition to a succession of events in time; it serves to designate detention "consequent upon" and not merely "subsequent to" the criminal court's decision (see, as the most recent authority, the Van Droogenbroeck v. Belgium judgment of 24 June 1982, Series A no. 50, p. 19, para. 35). This was not so in the instant case, since it was not incumbent on the French authorities themselves to execute the judgment delivered by the Genoa Assize Court of Appeal on 22 May 1975.

Article 5 para. 1 (*b*) *– Detention possible to guarantee the fulfilment of a legal obligation*

The Lawless judgment (1 July 1961, Series A no. 3, p. 47, para. 9) defines the conditions for the application of sub-paragraph (*b*). The Court states that "obligations prescribed by law", pursuant to which a person may be detained, are specific obligations and not general obligations (such as the obligation to respect the existing legal order). In that case Mr Lawless had been arrested because he was a member of the IRA. The Court observed:

> with regard to Article 5 (1) (*b*) *in fine*, the detention of Lawless by order of a Minister of State on suspicion of being engaged in activities prejudicial to the preservation of public peace and order or to the security of the state cannot be deemed to be a measure taken "in order to secure the fulfilment of any obligation prescribed by law", since that clause does not contemplate arrest or detention for the prevention of offences against public peace and public order or against the security of the state but for securing the execution of specific obligations imposed by law.

Article 5 para. 1 (*c*) *– Detention in order to bring a person before a judge after an offence or suspected offence*

The same judgment illustrates the meaning of sub-paragraph (*c*). In paragraph 14 the Court stated that everyone arrested or detained under that sub-paragraph must be brought before the "legal authority" mentioned therein:

> The wording of Article 5 (1) (*c*) is sufficiently clear [...] It is evident that the expression "effected for the purpose of bringing him before the competent legal authority" qualifies every category of cases of arrest or detention referred to in that sub-paragraph. It follows that the said clause permits deprivation of liberty only when such deprivation is effected for the purpose of bringing the person arrested or detained before the competent judicial authority, irrespective of whether such person is a person who is reasonably suspected of having committed an offence, or a person whom it is reasonably considered necessary to restrain from committing an offence, or a person whom it is reasonably considered necessary to restrain from absconding after having committed an offence.

Furthermore, in the Fox, Campbell, and Hartley v. the United Kingdom judgment (30 August 1990, Series A no. 182, p. 16, para. 32), which concerned arrest by the police in Northern Ireland on the basis of statutory provisions, the Court explained what is meant by a "reasonable suspicion" justifying arrest:

> The "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 para. 1 (*c*) [...] . [H]aving a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will however depend upon all the circumstances.
>
> In this respect, terrorist crime falls into a special category. Because of the attendant risk of loss of life and human suffering, the police are obliged to act with utmost urgency in following up all information, including information from secret sources. Further, the police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy the source of information, be revealed to the suspect or produced in court to support a charge.

Article 5 para. 1 (*d*) *– Detention of a minor in the context of educational supervision or court appearance*

Regarding educational supervision, the Bouamar judgment (29 February 1988, Series A no. 129, p. 21, paras. 50-51, and p. 22, para. 53) illustrates sub-paragraph (*d*). In that case Naïm Bouamar, a minor who

had committed punishable offences, had been placed in a remand prison on nine occasions for periods not exceeding 15 days. Under Belgian law a minor may be placed in a remand prison where no immediate place can be found with a person or institution. The Court observed that:

> the confinement of a juvenile in a remand prison does not necessarily contravene sub-paragraph (*d*), even if it is not in itself such as to provide for the person's "educational supervision". As is apparent from the words "for the purpose of" ("*pour*"), the "detention" referred to in the text is a means of ensuring that the person concerned is placed under "educational supervision", but the placement does not necessarily have to be an immediate one. Just as Article 5 para. 1 recognises – in sub-paragraphs (*c*) and (*a*) – the distinction between pre-trial detention and detention after conviction, so sub-paragraph (*d*) does not preclude an interim custody measure being used as a preliminary to a regime of supervised education, without itself involving any supervised education. In such circumstances, however, the imprisonment must be speedily followed by actual application of such a regime in a setting (open or closed) designed and with sufficient resources for the purpose.
>
> In the instant case the applicant was, as it were, shuttled to and fro between the remand prison at Lantin and his family. In 1980 alone, the juvenile courts ordered his detention nine times and then released him on or before the expiry of the statutory limit of fifteen days; in all, he was thus deprived of his liberty for 119 days during the period of 291 days from 18 January to 4 November 1980 (see paragraph 8 above).
>
> [...]
>
> The Court accordingly concludes that the nine placement orders, taken together, were not compatible with sub-paragraph (*d*). Their fruitless repetition had the effect of making them less and less "lawful" under sub-paragraph (*d*), especially as Crown Counsel never instituted criminal proceedings against the applicant in respect of the offences alleged against him.
>
> There was therefore a breach of Article 5 para. 1 of the Convention.

Article 5 para. 1 (e) – Detention of persons of unsound mind, of those suffering from contagious disease, or of vagabonds

The Winterwerp v. the Netherlands judgment of 24 October 1979, Series A no. 33, p. 16, para. 37 illustrates the meaning of sub-paragraph (*e*).

> The Convention does not state what is to be understood by the words "persons of unsound mind". This term is not one that can be given a definitive interpretation: as was pointed out by the Commission, the Government and the applicant, it is a term whose meaning is continually evolving as research in psychiatry progresses, and increasing flexibility in treatment is developing and society's attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more wide-spread.
>
> In any event, sub-paragraph (*e*) of Article 5 para. 1 obviously cannot be taken as permitting the detention of a person simply because his views or behaviour deviate from the norms prevailing in a particular society.

In this judgment the Court stated also three minimum conditions which have to be satisfied in order for there to be "the lawful detention of a person of unsound mind" (para. 39).

> In the Court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of "unsound mind". The very nature of what has to be established before the competent national authority – that is, a true mental disorder – calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder (see *mutatis mutandis*, the Stögmüller judgment of 10 November 1969, Series A no. 9, pp. 39-40, para. 4, and the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 43, para. 82).

With regard to "medical expertise" the Court added in the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, p. 19, para. 41:

> [It cannot be] inferred from the Winterwerp judgment that the "objective medical expertise" must in all conceivable cases be obtained before rather than after confinement of a person on the ground of unsoundness of mind. Clearly, where a provision of domestic law is designed, amongst other things, to authorise emergency confinement of persons capable of presenting a danger to others, it would be impracticable to require thorough medical examination prior to any arrest or detention. A wide discretion must in the nature of things be enjoyed by the national authority empowered to order such emergency confinements.

Article 5 para. 2 – Right to be informed of the reasons for arrest

Article 5 paragraph 2 is worded as follows:

> **2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.**

1. The scope of paragraph 2

In the van der Leer v. the Netherlands case the Burgomaster had ordered the applicant's confinement in a local psychiatric hospital. Before the Court the applicant submitted that she had not be immediately informed of the order authorising her confinement. The Government argued that "paragraph 2 did not apply to the case in question because the words "arrest" and "charge" showed that it was only relevant to cases arising under the criminal law. The Court considered otherwise (van der Leer v. the Netherlands judgment of 21 February 1990, Series A no. 170-A, p. 13, paras. 27, 28):

> The Court is not unmindful of the criminal-law connotation of the words used in Article 5 para. 2. However, it agrees with the Commission that they should be interpreted "autonomously", in particular in accordance with the aim and purpose of Article 5, which are to protect everyone from arbitrary deprivations of liberty. Thus the "arrest" referred to in paragraph 2 of Article 5 extends beyond the realm of criminal-law measures. Similarly, in using the words "*any* charge" ("*toute* accusation") in this provision, the intention of the drafters was not to lay down a condition for its applicability, but to indicate an eventuality of which it takes account.
>
> The close link between paragraphs 2 and 4 of Article 5 supports this interpretation. Any person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty (see *mutatis mutandis*, the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, p. 28, para. 66).

2. The application of paragraph 2

In the Fox, Campbell and Hartley v. the United Kingdom case the applicants complained that "they were not given at the time of their arrest adequate and understandable information of the substantive grounds for their arrest". In its judgment of 30 August 1990, Series A no. 182, p. 19, para. 40 the Court interpreted and applied Article 5 para. 2 as follows:

> Paragraph 2 of Article 5 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4 (see the van der Leer judgment of 21 February 1990, Series A no. 170, p. 13, para. 28). Whilst this information must be conveyed "promptly" (in French: "*dans le plus court délai*"), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.

Article 5 para. 3 – Right to be brought before a judge

Article 5 para. 3 is worded as follows:

> **3. Everyone who is arrested or detained in accordance with the provisions of paragraph 1.*c* of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.**

1. The fundamental nature of the right to be brought before a judge, trial within a reasonable time, or release

The Court emphasises the fundamental nature of the right laid down in this paragraph. In the Brogan and Others v. the United Kingdom case (29 November 1988, Series A no. 145-B, p. 32, para. 58 *in fine*) concerning the detention of persons suspected of terrorism, the Court stated in connection with Article 5 para. 3:

> it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the state with his right to liberty (see the Bozano judgment of 18 December 1986, Series A no. 111, p. 23, para. 54). Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 para. 3, which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, "one of the fundamental principles of a democratic society [...], which is expressly referred to in the Preamble to the Convention" (see, *mutatis mutandis*, the above-mentioned Klass and Others judgment, Series A no. 28, pp. 25-26, para. 55) and "from which the whole Convention draws its inspiration" (see, *mutatis mutandis*, the Engel and Others judgment of 8 June 1976, Series A no. 22, p. 28, para. 69).

2. The implications of the right of arrested persons to be brought before a judge

Article 5 para. 3 deals in fact with two rights. The first, that of any person arrested to be brought before a judge, requires explanation.

Field of application of the right to be brought before a judge

In the above-mentioned Brogan case (p. 31, beginning of para. 58) the Court confirmed the principles already laid down and indicated, in particular, the time from which that provision is brought into play:

> The fact that a detained person is not charged or brought before a court does not in itself amount to a violation of the first part of Article 5 para. 3. No violation of Article 5 para. 3 can arise if the arrested person is released "promptly" before any judicial control of his detention would have been feasible (see the de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p. 25, para. 52). If the arrested person is not released promptly, he is entitled to a prompt appearance before a judge or judicial officer.

The notion of being brought "promptly" before a judge

It is necessary to examine the meaning of "promptly", i.e. of the promptness with which the appropriate action is taken. In that regard the Court stated, still in the above-mentioned Brogan judgment (p. 33, paras. 59, 62):

> The obligation expressed in English by the word "promptly" and in French by the word "*aussitôt*" is clearly distinguishable from the less strict requirement in the second part of paragraph 3 ("reasonable time"/"*délai raisonable*") and even from that in paragraph 4 of Article 5 ("speedily"/"*à bref délai*"). The term "promptly" also occurs in the English text of paragraph 2, where the French text uses the words "*dans le plus court délai*". As indicated in the Ireland v. the United Kingdom judgment (18 January 1978, Series A no. 25, p. 76, para. 199), "promptly" in paragraph 3 may be understood as having a broader significance than "*aussitôt*", which literally means immediately. Thus confronted with versions of a law-

making treaty which are equally authentic but not exactly the same, the Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty (see, *inter alia*, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 30, para. 48, and Article 33 para. 4 of the Vienna Convention of 23 May 1969 on the Law of Treaties).

The use in the French text of the word "*aussitôt*", with its constraining connotation of immediacy, confirms that the degree of flexibility attaching to the notion of "promptness" is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. Whereas promptness is to be assessed in each case according to its special features (see the de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p. 25, para. 52), the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5 para. 3, that is to the point of effectively negating the state's obligation to ensure a prompt release or a prompt appearance before a judicial authority.

The scope for flexibility in interpreting and applying the notion of "promptness" is very limited. In the Court's view, even the shortest of the four periods of detention, namely the four days and six hours spent in police custody by Mr McFadden (see paragraph 18 above), falls outside the strict constraints as to time permitted by the first part of Article 5 para. 3. To attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word "promptly". An interpretation to this effect would import into Article 5 para. 3 a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision. The Court thus has to conclude that none of the applicants was either brought "promptly" before a judicial authority or released "promptly" following his arrest. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with specific requirements of Article 5 para. 3.

The notion of the "judge or other officer"

Clearly, the notion of "officer" is also of fundamental importance in the application of Article 5. The Schiesser v. Switzerland judgment (4 December 1979, Series A no. 34, p. 11-12, paras. 25-26; p. 13-14, para. 31; p. 16, para. 38) established a precedent in that respect. It is unnecessary to summarise the facts except to point out that Mr Schiesser had been brought before a member of the *parquet*. The question for the Court was whether the Attorney in question could be regarded as an "officer authorised by law to exercise judicial power" within the meaning of Article 5 para. 3. The Court considered the notions of "officer" and "judge" and then set out the following criteria before reaching its decision:

the Court has to ascertain only whether the said Attorney possessed the attributes of an "officer authorised by law to exercise judicial power".

This last phrase has three components.

The second component ("authorised by law to exercise") does not give rise to any difficulty: the Winterthur District Attorney exercised in the instant case powers conferred on him by Cantonal law (see paragraphs 7, 12 and 15-17 above); this is contested neither by the Commission, nor by the Government, nor by the applicant.

The first and third components ("officer", "judicial power") have to be considered together.

[...]

the "officer" is not identical with the "judge" but must nevertheless have some of the latter's attributes, that is to say he must satisfy certain conditions each of which constitutes a guarantee for the person arrested.

The first of such conditions is independence of the executive and of the parties (see, *mutatis mutandis*, the above-mentioned Neumeister judgment, p. 44). This does not mean that the "officer" may not be to some extent subordinate to other judges or officers provided that they themselves enjoy similar independence.

> In addition, under Article 5 para. 3, there is both a procedural and a substantive requirement. The procedural requirement places the "officer" under the obligation of hearing himself the individual brought before him (see, *mutatis mutandis*, the above-mentioned Winterwerp judgment, p. 24, para. 60); the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons (above-mentioned Ireland v. the United Kingdom judgment, p. 76, para. 199).
>
> In verifying whether these various conditions are satisfied, the Court does not have to deal with questions that do not arise in the instant case, for example whether an officer is fitted, by reason of his training or experience, to exercise judicial power.
>
> [...]
>
> The Court is [...] of the opinion that the Winterthur District Attorney offered in the present case the guarantees of independence and the procedural and substantive guarantees inherent in the notion of "officer authorised by law to exercise judicial power". There has accordingly been no breach of Article 5 para. 3.

The Court reached a different conclusion in the De Jong, Baljet and Van den Brink v. the Netherlands judgment (22 May 1984, Series A no. 77, p. 24, paras. 48-49). The issue in that case was whether an *auditeur-militaire* could be regarded as a judicial "officer" empowered to take decisions concerning detention. The Court took the view that he could not and condemned the practice followed because it did not ensure sufficient legal certainty in that case, even though it might be generally consistent with Article 5. The Court made two points:

> That is not sufficient to constitute authority given [to the *auditeur-militaire*] by "law" to exercise the requisite "judicial power" contemplated by Article 5(3) (see the final part of the passage from the Schiesser judgment cited above at paragraph 47).
>
> In addition, the *auditeur-militaire* did not enjoy the kind of independence demanded by Article 5 para. 3. Although independent of the military authorities, the same *auditeur-militaire* could be called upon to perform the function of prosecuting authority after referral of the case to the Military Court (Article 126, first paragraph, of the Military Code – see paragraph 19, first sub-paragraph, above). He would thereby become a committed party to any criminal proceedings subsequently brought against the serviceman on whose detention he was advising prior to referral for trial. The *auditeur-militaire* could not be "independent of the parties" (see the extract from the Schiesser judgment quoted above at paragraph 47) at this preliminary stage precisely because he was liable to become one of the parties at the next stage of the procedure (see the judgment of today's date in the case of Duinhof and Duijf, Series A no. 79, para. 38).

Right to trial within a reasonable time or to release

Article 5 paragraph 3 refers to another right: that of "trial within a reasonable time or to release pending trial". In the Neumeister v. Austria case (27 June 1968, Series A no. 8, p. 37, paras. 4 and 5; p. 38, para. 8; p. 40, para. 12; and p. 41, para. 15) the Court first of all specifies the meaning and scope of that provision. It then goes on to examine the actual case and points out that while being detained the applicant was not questioned during a period of fifteen months. Taken together with other factors to do with the absence of danger of flight, that led the court to consider that the detention in question exceeded a reasonable time and that the applicant should have been released during the proceedings. The Court stated:

> The Court is of the opinion that this provision cannot be understood as giving the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional release even subject to guarantees. The reasonableness of the time spent by an accused person in detention up to the beginning of the trial must be assessed in relation to the very fact of his detention. Until conviction he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable. This is,

> moreover, the intention behind the Austrian legislation (Section 190 (1) of the Code of Criminal Procedure).
>
> The Court is likewise of the opinion that, in determining in a given case whether or not the detention of an accused person exceeds a reasonable limit, it is for the national judicial authorities to seek all the facts arguing for against the existence of a genuine requirement of public interest justifying a departure from the rule of respect for individual liberty.
>
> [...]
>
> the applicant, who had already been the subject of a long investigation, was not interrogated again during the fifteen months which elapsed between his second arrest (12th July 1962) and the close of the investigation (4th November 1963).
>
> [...]
>
> The Court is of the opinion that [...] the danger that Neumeister would avoid appearing at the trial by absconding was, in October 1962 in any event, no longer so great.
>
> [...]
>
> For these reasons, the Court finds that Neumeister's continued provisional detention until 16 September 1964 constituted a violation of Article 5 para. 3 of the Convention.

In the case of W. v. Switzerland (judgment of 26 January 1993, Series A no. 254, p. 15, para. 30) the applicant, who was prosecuted for a series of economic offences, complained about the length of his pre-trial detention, which lasted for four years and three days.

> The Commission's opinion was based on the idea that Article 5 para. 3 implies a maximum length of pre-trial detention. The Court cannot subscribe to this opinion, which moreover finds no support in its case-law. That case-law in fact states that the reasonable time cannot be assessed *in abstracto* (see, *mutatis mutandis*, the Stögmüller v. Austria judgment of 10 November 1969, Series A no. 9, p. 40, para. 4). As the Court has already found in the Wemhoff v. Germany judgment of 27 June 1968, the reasonableness of an accused person's continued detention must be assessed in each case according to its special features (Series A no. 7, p. 24, para. 10). Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.
>
> It falls in the first place to the national judicial authorities to examine all the circumstances arguing for or against the existence of such a requirement and to set them out in their decisions on the application for release. It is essentially on the basis of the reasons given in these decisions and of the true facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 para. 3.
>
> The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices: the Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see, as the most recent authority, the Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, p. 35, para. 84).

In this case the Court concluded that there has not been a violation of Article 5 para. 3, having regard to the danger of absconding and collusion. These dangers were relevant and sufficient reasons for the continued pre-trial detention.

Article 5 para. 4 – Right to appeal against detention

Article 5 paragraph 4 is worded as follows:

> **4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.**

1. The relationships between paragraph 4 and the other paragraphs

Paragraph 4 and paragraph 3

The first important point concerns the relationship between paragraph 4 and paragraph 3. Are the two paragraphs to be applied concurrently? In the De Jong, Baljet and Van den Brink v. the Netherlands judgment, (22 May 1984, Series A no. 77, p. 25-26, para. 57), the Court answered this question in the affirmative, thus recalling principles which had already been identified. In that case the persons arrested had the right not only to be "brought promptly before a judge" but also to "take proceedings by which the lawfulness of [their] detention [should] be decided speedily by a court".

> The procedure followed for bringing a person before the "competent legal authority" in accordance with paragraph 3 taken in conjunction with paragraph 1 (*c*) may admittedly have a certain incidence on compliance with paragraph 4. For example, where that procedure culminates in a decision by a "court" ordering or confirming deprivation of the person's liberty, the judicial control of lawfulness required by paragraph 4 is incorporated in this initial decision (the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 40, para. 76, and the above-mentioned Van Droogenbroeck judgment, Series A no. 50, p. 23, paras. 44-45). However, the guarantee assured by paragraph 4 is of a different order from, and additional to, that provided by paragraph 3. The Court itself has on several previous occasions examined whether the same set of facts gave rise to a breach of both paragraphs 3 and 4 of Article 5, without ever suggesting that the safeguards provided might not apply concurrently (the Neumeister judgment of 27 June 1968, Series A no. 8, pp. 36-41 and 43-44, paras. 3-15 and 22-25; the Matznetter judgment of 10 November 1969, Series A no. 9, pp. 31-35, paragraphs 2-13; the Ireland v. the United Kingdom judgment, Series A no. 25, pp. 75-77, paras. 199-200). The Court sees no reason in the present case not to apply these two paragraphs concurrently.

Paragraph 4 and paragraph 1

The Court has also explained the link between paragraph 1 and paragraph 4. Thus, in the Winterwerp v. the Netherlands case (24 October 1979, Series A no. 33, pp. 22-23, para. 55) it observed that the reasons justifying detention within the meaning of paragraph 1 may cease to exist. The application of paragraph 4 must therefore be subject to review. This is clearly so where the detention was justified under paragraph 1 (*e*).

> The very nature of the deprivation of liberty under consideration would appear to require a review of lawfulness to be available at reasonable intervals.

However, the Court has indicated that the judicial control required by paragraph 4 is not the same in all cases of detention authorised by Article 5 para. 1. In the van Droogenbroeck v. Belgium case (24 June 1982, Series A no. 50, p. 24, para. 47) the Court observed, in particular, that:

> The Court recalls that the scope of the obligation undertaken by the Contracting States under paragraph 4 of Article 5 "will not necessarily be the same in all circumstances and as regards every category of deprivation of liberty" (see the above-mentioned X v. the United Kingdom judgment, Series A no. 46, p. 22, para. 52). It has not overlooked the fact that in the present case the detention at issue was covered only by sub-paragraph (*a*) of paragraph 1 and not by sub-paragraph (*e*), as in the Winterwerp and the De Wilde, Ooms and Versyp cases, or by both of those sub-paragraphs taken together, as in the case of X v. the United Kingdom (*ibid*., pp. 17-18, para. 39).

If the person was detained following the intervention of a court Article 5 para. 4 is deemed to have been observed. Therefore no problem should arise where detention falls within the scope of Article 5 para. 1 (*a*) (the theory that the judicial control provided for in paragraph 4 is incorporated in the decision

adopted by the court in accordance with paragraph 1 (*a*)). None the less, the Court considers that Article 5 para. 4 may still be applicable. Thus in the X v. the United Kingdom case (Series A no. 46, pp. 22-23, para. 52) the Court, citing the Winterwerp judgment, held that

> it would be contrary to the object and purpose of Article 5 [...] to interpret paragraph 4 [...] as making [...] confinement immune from subsequent review of lawfulness merely provided that the initial decision issued from a court.

This authority is applicable in two types of case: where there is an actual or potential change in the detained person's situation (re-confinement, re-imprisonment, etc.); and where the procedure followed by the court has failed to provide "guarantees appropriate to the kind of deprivation of liberty in question" (the above-mentioned Winterwerp case, para. 57). As regards the first type of case, the van Droogenbroeck v. Belgium judgment (24 June 1982, Series A no. 50, p. 26, para. 48) provides a very interesting example: in that case the court had ordered that the applicant be placed at the Government's disposal, which meant, *inter alia*, that the Minister of Justice could have him detained in the event of "social danger". There was, of course, an initial court decision: but the Court took the view that there was a risk of arbitrariness when the Minister adopted a decision on the existence of such danger. This made the application of Article 5 para. 4 necessary. The Court made the general observation that:

> Quite apart from conformity with domestic law, "no detention that is arbitrary can ever be regarded as 'lawful'" for the purposes of paragraph 1 (see, amongst others, the above-mentioned X v. the United Kingdom judgment, Series A no. 46, p. 19, para. 43). This is the limit which the Minister of Justice must not exceed in the exercise of the wide discretion he enjoys in executing, or implementing, the initial court decision. This requirement is rendered all the more compelling by the seriousness of what is at stake, namely the possibility that the individual may be deprived of his liberty for up to ten years (section 23 of the Act) or even longer (section 22). This type of detention would no longer be in conformity with the Convention if it ceased to be based on reasons that are plausible and consistent with the objectives of the Social Protection Act; for the purposes of Article 5, it would become "unlawful". It follows that the individual concerned must be entitled to apply to a "court" having jurisdiction to determine whether or not there has been a violation of that kind; this possibility must be open to him during the course of his detention – once a certain period has elapsed since the detention began and thereafter at reasonable intervals (see, *mutatis mutandis*, the above-mentioned X v. the United Kingdom judgment, Series A no. 46, pp. 22-23, para. 52) – and also at the moment of any return to detention after being at liberty.

2. The notions contained in the right to appeal against detention

Besides the questions of co-ordination with the other paragraphs of Article 5, we should examine what is meant by the right to appeal against detention.

Three notions are introduced in Article 5 para. 4: they are "speedily", "lawfulness" and "court".

The detention shall be examined "speedily"

The notion of "speedily" refers both to the period within which the detained person must be able to take proceedings and to the period within which his action must be dealt with. We shall examine one judgment for each of these two aspects.

The above-mentioned De Jong, Baljet and Van den Brink judgment (22 May 1984, Series A no. 77, p. 26, para. 58), deals with the first aspect. The possibility of the applicants' appealing against their detention was dependent on their first being referred to trial before the appropriate body. The Court took the opportunity to point out that:

> Article 34 of the Military Code is capable in practice of leading to a "speedy" decision, depending upon how rapidly the referral for trial occurs in the particular circumstances. Mr de Jong was seven days, Mr Baljet 11 days and Mr Van den Brink six days in custody before being referred for trial (see paragraphs 23 and 27, above) and hence without a remedy. In the Court's view, even having regard to the exigencies of military life and military justice, the length of absence of access to a court was in each case such as to

> deprive the applicant of his entitlement to bring proceedings to obtain a "speedy" review of the lawfulness of his detention.

The Letellier v. France judgment (26 June 1991, Series A no. 207, p. 22, para. 56) concerned the second aspect. The Court observed first of all that where the procedure for the consideration of an application for review under paragraph 4 lasts a relatively long time owing to successive actions, there is no violation of the requirement that a decision be given "speedily" if new appeals could be submitted at any time. In the case in question there were several appeals. As regards the duration of the examination of an application for review, the judgment provides an indication of the acceptable limits. It is observed that:

> The Court has certain doubts about the overall length of the examination of the second application for release, in particular before the indictments divisions called upon to rule after a previous decision had been quashed in the Court of Cassation; it should however be borne in mind that the applicant retained the right to submit a further application at any time. Indeed from 14 February 1986 to 5 August 1987 she lodged six other applications, which were all dealt with in periods of from eight to 20 days (see paragraph 23, above).

The examination of the detention must consider the "lawfulness"

The second important concept is that of "lawfulness". The Brogan and Others v. the United Kingdom case (29 November 1988, Series A no. 145-B, p. 34-35, para. 65) provides some indications of this notion:

> According to the Court's established case-law, the notion of "lawfulness" under paragraph 4 has the same meaning as in paragraph 1 (see notably the Ashingdane judgment of 28 May 1985, Series A no. 93, p. 23, para. 52); and whether an "arrest" or "detention" can be regarded as "lawful" has to be determined in the light not only of domestic law, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 para. 1 (see notably the above-mentioned Weeks judgment, Series A no. 114, p. 28, para. 57). By virtue of paragraph 4 of Article 5, arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty. This means that, in the instant case, the applicants should have had available to them a remedy allowing the competent court to examine not only compliance with the procedural requirements set out in section 12 of the 1984 Act but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention.

The examination of the detention must come before a "court"

The Court also had the opportunity to state in the Neumeister v. Austria case (27 June 1968, Series A no. 8) that the term "court" implies only that the authority called upon to decide an issue for the purpose of Article 5 para. 4 must possess a judicial character, that is to say be independent both of the executive and of the parties to the case; in no way does it relate to the procedure to be followed.

Paragraphs 3 and 4: common questions

These "common questions" are the procedural questions implied by both paragraphs. In the Winterwerp v. the Netherlands judgment, which concerned the detention of a person of unsound mind (judgment of 24 October 1979, Series A no. 33, p. 24, para. 60), the Court spoke of the right to be heard in person or to be represented by an advocate:

> The judicial proceedings referred to in Article 5 para. 4 need not, it is true, always be attended by the same guarantees as those required under Article 6 para. 1 for civil or criminal litigation (see the above-mentioned De Wilde, Ooms and Versyp judgment, p. 42, para. 78 *in fine*). Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty" (see the last-mentioned judgment, p. 41, para. 76). Mental illness may entail restricting or modifying the manner of exercise of

> such a right (see, as regards Article 6 para. 1, the above-mentioned Golder judgment, p. 19, para. 39), but in cannot justify impairing the very essence of the right. Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves.

The Court continued (paras. 66, 61 and 67 in turn):

> Furthermore, Article 5 para. 4 does not require that persons committed to care under the head of "unsound mind" should themselves take the initiative in obtaining legal representation before having recourse to a court.
>
> [...]
>
> As to the particular facts, the applicant was never associated, either personally or through a representative, in the proceedings leading to the various detention orders made against him: he was never notified of the proceedings or of their outcome; neither was he heard by the courts or given the opportunity to argue his case.
>
> [...]
>
> Mr Winterwerp was accordingly the victim of a breach of Article 5 para. 4.

There are therefore essential procedural requirements to be observed. Just one further example will be given. In the Lamy v. Belgium judgment (30 March 1989, Series A no. 151, p. 17, para. 29) the Court again emphasised the importance of the *inter partes* principle. It first of all ascertained whether that principle had been complied with from the aspect of paragraphs 3 and 4 and observed that:

> The appraisal of the need for a remand in custody and the subsequent assessment of guilt are too closely linked for access to documents to be refused in the former case when the law requires it in the latter case.
>
> Whereas Crown Counsel was familiar with the whole file, the procedure did not afford the applicant an opportunity of challenging appropriately the reasons relied upon to justify a remand in custody. Since it failed to ensure equality of arms, the procedure was not truly adversarial (see, *mutatis mutandis*, the Sanchez-Reisse judgment previously cited, Series A no. 107, p. 19, para. 51).
>
> There was therefore a breach of Article 5 para. 4.

In relation to paragraph 3, the Court then observed (para. 35):

> The Court notes that the investigating judge at Verviers issued a warrant – containing reasons – for Mr Lamy's arrest on the very day that he had questioned him, and that the *chambre du conseil* upheld the arrest and likewise gave reason for its successive orders (see paragraphs 9, 16 and 32 above).
>
> It should also be noted that the detention on remand ended well before committal for trial and the subsequent conviction.
>
> The procedure therefore complied with the requirements of Article 5 para. 3.

Article 5 paragraph 5 – Right to compensation

Article 5 paragraph 5 is worded as follows:

> **5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.**

The scope of paragraph 5

In the Brogan and others v. the United Kingdom judgment of 29 November 1988, Series A no. 145-B, p. 35, paras. 66, 67 the Court observed:

> The Government argued, *inter alia*, that the aim of paragraph 5 is to ensure that the victim of an "unlawful" arrest or detention should have an enforceable right to compensation. In this regard, they have also contended that "lawful" for the purposes of the various paragraphs of Article 5 is to be construed as essentially referring back to domestic law and in addition as excluding any element of arbitrariness. They concluded that even in the event of a violation being found of any of the first four paragraphs, there has been no violation of paragraph 5 because the applicants' deprivation of liberty was lawful under Northern Ireland law and was not arbitrary.
>
> The Court, like the Commission, considers that such a restrictive interpretation is incompatible with the terms of paragraph 5 which refers to arrest or detention "in contravention of the provisions of this Article".
>
> In the instant case, the applicants were arrested and detained lawfully under domestic law, but in breach of paragraph 3 of Article 5. This violation could not give rise, either before or after the findings made by the European Court in the present judgment, to an enforceable claim for compensation by the victims before the domestic courts; this was not disputed by the Government
>
> Accordingly, there has also been a breach of paragraph 5 in this case in respect of all four applicants.

The notion of "compensation"

In the Wassink v. the Netherlands case the applicant was confined to a psychiatric hospital without compliance with a "procedure prescribed by law" as mentioned in Article 5 para. 1. The applicant alleges that for this breach of Article 5 para. 1 he could only obtain compensation according to the tort provision in the Dutch Civil Code. This provision is only applicable where damage could be shown. The applicant submitted that "in his case, the existence of damage would have been almost impossible to prove because it could not be affirmed with absolute certainty that proceedings conducted in conformity with Article 5 of the Convention would have led to the desired result". In the Wassink v. the Netherlands judgment of 27 September 1990, Series A no. 185-A, p. 14, para. 38, the Court considered:

> In the Court's view, paragraph 5 of Article 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4. It does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach. In the context of Article 5 para. 5, as for that of Article 25 (see, *inter alia*, the Huvig judgment of 24 April 1990, Series A no. 176-B, pp. 56-57, para. 35), the status of "victim" may exist even where there is no damage, but there can be no question of "compensation" where there is no pecuniary or non-pecuniary damage to compensate.

Article 6 ECHR – Right to a fair trial

Article 6 para. 1

Article 6 para. 1 contains a number of general provisions concerning the administration of justice. It is worded as follows:

> 1. **In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.**

1. Scope of the "right to a tribunal"

The first point to note is that the right to a tribunal exists in connection with the "determination of [a person's] civil rights and obligations" (in French: *contestations sur les droits et obligations de caractère civil*). The notions contained in that expression should be explained at the outset.

Right to a tribunal for the determination of civil rights and obligations

The notion of "dispute" ("contestation")

The Benthem v. the Netherlands judgment (23 October 1985, Series A no. 97, p. 15, para. 32) provides a summary of the case-law of the Court concerning that notion:

> The principles that emerge from the Court's case-law include the following:
>
> (*a*) Conformity with the spirit of the Convention requires that the word "*contestation*" (dispute) should not be "construed too technically" and should be "given a substantive rather than a formal meaning" (see the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 20, para. 45).
>
> (*b*) The "*contestation*" (dispute) may relate not only to "the actual existence of a [...] right" but also to its scope or the manner in which it may be exercised (see the same judgment, loc. cit., p. 22, para. 49). It may concern both "questions of fact" and "questions of law" (see the same judgment, loc. cit., p. 23, para. 51 in fine, and the Albert and Le Compte judgment of 10 February 1983, Series A no. 58, p. 16, para. 29 *in fine*, and p. 19, para. 36)
>
> (*c*) The "*contestation*" (dispute) must be genuine and of a serious nature (see the Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p. 30, para. 81).
>
> (*d*) According to the Ringeisen judgment of 16 July 1971, "the [...] expression '*contestations sur* (*des*) *droits et obligations de caractère civil*' [disputes over civil rights and obligations] covers all proceedings the result of which is decisive for [such] rights and obligations" (Series A no. 13, p. 39, para. 94). However, "a tenuous connection or remote consequences do not suffice for Article 6 para. 1 [...]: civil rights and obligations must be the object – or one of the objects – of the '*contestation*' (dispute); the result of the proceedings must be directly decisive for such a right" (see the above-mentioned Le Compte, Van Leuven and De Meyere judgment, Series A no. 43, p. 21, para. 47).

In that case a dispute between an individual and the state over the issue of a licence to exploit a petrol distribution installation constituted a dispute (*contestation*) within the meaning of the Convention. The state maintained that no right had yet been created and, consequently, that no dispute had arisen. The Court pointed out that the applicant had had a municipal permit to begin to use the installation.

Notion of "civil rights and obligations"

The Court has emphasised the autonomy of this notion in relation to domestic law., and recognised the role played by national law in the definition of the concept. In the König v. Germany case (28 June 1978, Series A no. 27, pp. 29 and 30, paras. 88 and 89) the Court declared that:

> The concept of "civil rights and obligations" cannot be interpreted [simply] by reference to the domestic law of the respondent state.
>
> While the Court thus concludes that the concept of "civil rights and obligations" is autonomous, it nevertheless does not consider that, in this context, the legislation of the state concerned is without importance. Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effect of the right – and not its legal classification – under the domestic law of the state concerned.

The Court again specified the role played by internal legislation in the James and Others v. the United Kingdom judgment (21 February 1986, Series A no. 98, p. 46, para. 81). In the Court's view, to come under the scope of Article 6 the "civil rights and obligations" must, irrespective of their own nature, be identified as rights by the national law.

> Article 6 extends only to "*contestations*" (disputes) over (civil) "rights and obligations" which can be said, at least on arguable grounds to be recognised under domestic law; it does not in itself guarantee any particular content for (civil) "rights and obligations" in the substantive law of the Contracting States.

The Court thus appears to take the view that it is up to internal law to define a particular concept as a "right" or an "obligation"; but it does not lay down or fix the criteria by which this concept may subsequently be judged as being "civil" in the terms of the Convention.

Furthermore, the Court has refused to define this notion *in abstracto*. Take, for example, the above-mentioned Benthem case (*ibid*., p. 16, para. 35), where the Court stated:

> The Court does not consider that it has to give on this occasion an abstract definition of the concept of "civil rights and obligations".

None the less, the Court has taken care to state that no distinction is to be drawn between questions of private law and questions of public law and that the application of the expression "civil rights and obligations" is not to be confined to disputes between individuals. All that counts is the nature of the right in question. In the above-mentioned König judgment (p. 30, para. 90) the Court held that:

> [Article 6 does not cover solely] private-law disputes in the traditional sense, that is disputes between individuals or between an individual and the state to the extent that the latter had been acting as a private person, subject to private law [and not] acting in its sovereign capacity.
>
> [...]
>
> Only the character of the right [in question] is relevant.

The Court thus confirmed its decision in the Ringeisen v. Austria judgment (16 July 1971, Series A no. 13, p. 39, para. 94), where it stressed the concept of "civil law right" and observed that:

> The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are [...] of little consequence.

In the Court's view what is of consequence is the intrinsic nature of the right or obligation in question, which in this case is essentially private (see the Ringeisen judgment).

For the sake of completeness on this point, it should be observed that the Court will find that the right at issue before it is a "private" right provided that interests of an economic nature are at issue. Thus, in the Schuler-Zgraggen v. Switzerland case (24 June 1993, Series A no. 263, p. 17, para. 46) the Court observed in relation to questions concerning an invalidity benefit and social insurance benefits:

> The most important [consideration] lies in the fact that despite the public-law features pointed out by the Government, the applicant was not only affected in her relations with the administrative authorities as such but also suffered an interference with her means of subsistence; she was claiming an individual, economic right flowing from specific rules as laid down in a federal statute (see paragraph 35 above).

Furthermore, in the Procola v. Luxembourg judgment (28 September 1995, Series A no. 326, para. 38 the Court reiterates that:

> Article 6 para. 1 is applicable where an action is "pecuniary" in nature and is founded on an alleged infringement of rights which are likewise pecuniary rights, notwithstanding the origin of the dispute and the fact that the administrative courts have jurisdiction (see, among other authorities, the Editions Périscope v. France judgment of 26 March 1992, Series A no. 234-B, p. 65, para. 40, and the Beaumartin v. France judgment of 24 November 1994, Series A no. 296-B, pp. 60-61, para. 28).

Article 6 thus applies in respect of private rights and obligations as defined above. It also applies to criminal charges.

Right to a tribunal for the "criminal charge"

The notion of the "criminal charge"

First of all, it is necessary to deal with the concept of "criminal charge". In the Deweer v. Belgium case (27 February 1980, Series A no. 35, pp. 22-24, paras. 42 and 44) the Court noted, first, that this expression has an autonomous meaning in the Convention and, secondly, that a substantive conception of the expression is to be preferred:

> The concept embodied in the French expression "*accusation en matière pénale*" is, however, "autonomous"; it has to be understood "within the meaning of the Convention" (see notably the König judgment of 28 June 1978, Series A no. 27, p. 29, para. 88).
>
> [...]
>
> the prominent place held in a democratic society by the right to a fair trial (see especially the above-mentioned Airey judgment, pp. 12-13, para. 24) prompts the Court to prefer a "substantive", rather than a "formal", conception of the "charge" contemplated by Article 6 para. 1. The Court is compelled to look behind the appearances and investigate the realities of the procedure in question.

Accordingly, the Court stated (*ibid*., para. 46):

> The "charge" could, for the purposes of Article 6 para. 1, be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence. In several decisions and opinions the Commission has adopted a test that appears to be fairly closely related, namely whether "the situation of the [suspect] has been substantially affected" (Neumeister case, Series B no. 6, p. 81; case of Huber v. Austria, Yearbook, vol. 18, p. 356, para. 67; [...]).

It will be observed that the Court has already dealt with the concept of "substantially affect [ing] the situation" of the person concerned (e.g. searches etc.). The Court established that concept as a definition of "charge" in the Foti and Others v. Italy case (10 December 1982, Series A no. 56, p. 18, para. 52). It was important to define the expression "charge" because it was at the point when the charge was laid that the "reasonable time" began to run.

Notion of "criminal matters"

Here, too, we find that the notion has an autonomous meaning. In the Campbell and Fell v. the United Kingdom case (28 June 1984, Series A no. 80, p. 35, para. 68) the Court reiterated the principles which it had established in the Engel case:

> The Court was confronted with a similar issue in the case of Engel and Others, which was cited in argument by those appearing before it in the present proceedings. In its judgment of 8 June 1976 in that case (Series A no. 22, pp. 33-35, paras. 80-82), the Court, after drawing attention to the "autonomy" of the

> notion of "criminal charge" as conceived of under Article 6, set forth the following principles which it re-affirmed in its Özturk judgment of 21 February 1984 (Series A no. 73, pp. 17-18, paras. 48-50).
>
> (*a*) The Convention is not opposed to the Contracting States creating or maintaining a distinction between criminal law and disciplinary law and drawing the dividing line, but it does not follow that the classification thus made is decisive for the purposes of the Convention.
>
> (*b*) If the Contracting States were able at their discretion, by classifying an offence as disciplinary instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention.

In seeking to ascertain the nature of a violation, the Court will take into account "the way in which it is described in domestic law, its nature, the degree of severity of the penalty and its purpose" (Engel and Others v. the Netherlands judgment, 8 June 1976, Series A no. 22, pp. 34-35, para. 82). In the Weber v. Switzerland case (22 May 1990, Series A no. 177, pp. 17-18, para. 31-34) the Court stressed again that the classification of the offence according to the legal system of the respondent state is of relative weight and serves only as a starting point. The second and third criterion – i.e. the nature of the offence and the nature and the degree of severity of the penalty incurred – are weightier. As a general rule, where there is deprivation of liberty, the Court will take the view that the breach arises from criminal matters. In the Engel case the fact that the applicant had been attached to a disciplinary unit in the army was a criminal matter for the purposes of the Convention. In the Weber case the Court notes that the fine – for breaching the confidentiality of a judicial investigation – that could amount to 500 Swiss francs and be converted into a term of imprisonment in certain circumstances, was sufficient important to warrant clasifying the offence as a criminal one under the Convention. In the Ravnsborg v. Sweden case (23 March 1994, Series A no. 283-B, p. 31, para. 35), on the other hand, the offences at issue, which were punished by fines, were not regarded as "criminal" by the Court. Having regard to the third criterion – the nature and degree of severity of the penalty – the possible amount to 1,000 kronor of each fine, which was convertible under Swedish law into a term of imprisonment, did not attain a level such as to make it a "criminal" sanction.

It was necessary to define the concepts of "determination of [...] civil rights and obligations" and "criminal charge". It is the definition of these concepts that determines the scope of Article 6 para. 1, i.e. the situations in which there is a right to a "tribunal".

2. The scope of the "right to a tribunal"

Right of access to tribunals

The Court has made one first, fundamental point concerning the scope of the right to have a case heard before a tribunal, in relation to a dispute over civil rights (Golder v. the United Kingdom case, 21 February 1975, pp. 25, 17-18, paras. 25, 35 and 36): it determined the question whether "Article 6 para. 1 is limited to guaranteeing in substance the right to a fair trial in legal proceedings which are already pending, or [...] secure [s] a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined":

> Were Article 6 para. 1 to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook (Lawless judgment of 1 July 1961, Series A no. 3, p. 52, and Delcourt judgment of 17 January 1970, Series A no. 11, pp. 14-15).
>
> [...]

> [...] it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1. This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (see the Wemhoff judgment of 27 June 1968, Series A no. 7, p. 23, para. 8), and to general principles of law.
>
> The Court thus reaches the conclusion [...] that Article 6 para. 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only.

It should be made clear, however, that the Court considers that this right of access is not absolute. Immediately after establishing the right, the Court observed (*ibid*., pp. 18-19, para. 38):

> The Court considers, accepting the views of the Commission and the alternative submission of the Government, that the right of access to the courts is not absolute. As this is a right which the Convention sets forth (see Articles 13, 14, 17 and 25) without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication.

In addition, in the Ashingdane v. the United Kingdom judgment (28 May 1985, Series A no. 93, pp. 24-25, para. 57) the Court considered with regard to these "implied limitations":

> these are permitted by implication since the right of access "by its very nature calls for regulation by the state, regulation which may vary in time and place according to the needs and resources of the community and of individuals" (see the above-mentioned Golder judgment, p. 19, para. 38, quoting the "Belgian Linguistics" judgment of 23 July 1968, Series A no. 6, p. 32, para. 5). In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field (see, *mutatis mutandis*, the Klass and Others judgment of 6 September 1978, Series A no. 28, p. 23, para. 49).
>
> Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired (see the above mentioned Golder and "Belgian Linguistics" judgments, *ibid*., and also the above-mentioned Winterwerp judgment, Series A no. 33, pp. 24 and 29, paras. 60 and 75). Furthermore, a limitation will not be compatible with Article 6 para. 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

It is certain that the Court will demand proof in permitting such limitations. In the Golder case the ministerial authorisation necessary under English law before a prisoner can communicate with his lawyer could not be denied to Mr Golder, who was attempting to be cleared of a charge relating to events which had taken place while he was detained in prison and as a result of which he was still subjected to a special prison regime (*ibid*., pp. 19-20, para. 40). Denying him the right to communicate with his lawyer constituted a violation of Article 6 para. 1.

In the Fayed v. the United Kingdom case (21 September 1994, Series A no. 294-B, p. 56**,** para. 83), on the other hand, the Court considered, in the light of the state's margin of appreciation, that:

> the limitation on the applicants' opportunity, before and after publication of the [...] report [of the Inspectors appointed by the Secretary of State to investigate House of Fraser PLC's affairs], to take legal proceedings to challenge the Inspectors' findings damaging to their reputations did not involve an unjustified denial of their "right to a court" under Article 6 para. 1.

The right of access is one of the aspects of the "right to a court". However, the Court has made it clear in the Hornsby v. Greece judgment (19 March 1997, Reports of Judgments and Decisions 1997-II, p. 510-511, para. 40) that Article 6 is not only concerned with the right to institute proceedings before

courts in civil matters. Also the "right" to the execution of a judgment is an integral part of Article 6. In this judgment the Court stated:

> The Court reiterates that, according to its established case-law, Article 6 para. 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect (see the Philis v. Greece (No. 1) judgment of 27 August 1991, Series A no. 209, p. 20, para. 59). However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention (see, *mutatis mutandis*, the Golder v. the United Kingdom judgment of 7 May 1974, Series A no. 18, pp. 16-18, paras. 34-36). Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6; moreover, the Court has already accepted this principle in cases concerning the length of proceedings (see, most recently, the Di Pede v. Italy and Zappia v. Italy judgments of 26 September 1996, Reports of Judgments and Decisions, 1996-IV, pp. 1383-1384, paras. 20-24 and pp. 1410-1411, paras. 16-20 respectively).

Effective right of access

The right of access to a tribunal must not only exist, but must also be effective. The mere existence of a right of access is not sufficient.

In another decision (the Airey v. Ireland case, 9 October 1979, Series A no. 32, pp. 12-14, para. 24) the Court took the opportunity to state that the member states must guarantee effective access to the courts. In that case the applicant, in the absence of legal aid and not being in a financial position to meet herself the costs involved, had been unable to find a solicitor willing to act for her. She could have appeared in person but the procedure was very complex. The Court found that there had been a violation of Article 6 para. 1:

> The Court does not regard [this possibility to go before the High Court without the assistance of a lawyer], of itself, as conclusive of the matter. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see, *mutatis mutandis*, the judgment of 23 July 1968 in the "Belgian Linguistics" case, Series A no. 6, p. 31, paragraphs 3 *in fine* and 4; the above-mentioned Golder case, p. 18, paragraph 35 in fine; the Luedicke, Belkacem and Koç judgment of 28 November 1978, Series A no. 29, pp. 17-18, paragraph 42; and the Marckx judgment of 13 June 1979, Series A no. 31, pp. 14-15, paragraph 31). This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see, *mutatis mutandis*, the Delcourt judgment of 17 January 1970, Series A no. 11, p. 15, paragraph 25). It must therefore be ascertained whether Mrs Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.
>
> [...]
>
> For these reasons, the Court considers it most improbable that a person in Mrs Airey's position (see paragraph 8 above) can effectively present his or her own case.
>
> [...]
>
> The Court concludes from the foregoing that the possibility to appear in person before the High Court does not provide the applicant with an effective right of access [...]

The Court explained the consequences of this finding on a state's obligation to institute a legal aid scheme (*ibid*., pp. 15-16, para. 26 *in fine*):

> The conclusion appearing at the end of paragraph 24 above does not therefore imply that the state must provide free legal aid for every dispute relating to a "civil right".
>
> To hold that so far-reaching an obligation exists would, the Court agrees, sit ill with the fact that the Convention contains no provision on legal aid for those disputes, Article 6 para. 3 dealing only with criminal proceedings. However, despite the absence of a similar clause for civil litigation, Article 6 para. 1 may sometimes compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.

3. The aim of the "right to a tribunal" clause

The purpose of this clause is to ensure a "decision" which will determine the rights of the applicants. The decision is to be taken by "an independent and impartial tribunal".

Notion of "independent and impartial tribunal"

Concept of the "tribunal"

Of various decisions, there are two which particularly merit attention. First of all, the Belilos v. Switzerland judgment (29 April 1988, Series A no. 132, p. 29, para. 64) sets out the criteria which the Court uses in order to determine whether the institution in question is a "tribunal" within the meaning of Article 6. The Court observed:

> According to the Court's case-law, a "tribunal" is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of the rule of law and after proceedings conducted in a prescribed manner (see, as the most recent authority, the judgment of 30 November 1987 in the case of H. v. Belgium, Series A no. 127, p. 34, para. 50). It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure – several of which appear in the text of Article 6 para. 1 itself (see, *inter alia*, the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 24, para. 55).

In the Campbell and Fell v. the United Kingdom judgment (28 June 1984, Series A no. 80, p. 39, para. 76) the Court considered:

> the word "tribunal" in Article 6 para. 1 is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country (see, *mutatis mutandis*, the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, p. 23, para. 53).

The "impartiality" of the tribunal

In the Saraiva de Carvalho v. Portugal case (22 April 1994, Series A no. 286-B, p. 38, para. 33) the Court recalls the tests which it employs in determining the impartiality of a tribunal. It states that:

> the existence of impartiality for the purposes of Article 6 para. 1 must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, among other authorities, the Fey v. Austria judgment of 24 February 1993, Series A no. 255-A, p. 12, para. 28).

The concept of an "independent" tribunal

The Court has ruled on a number of occasions on the independence of the tribunal within the meaning of Article 6. In the above-mentioned Campbell and Fell judgment (p. 40, para. 78), the Court laid down some criteria:

> In determining whether a body can be considered to be "independent" – notably of the executive and of the parties to the case (see, *inter alia*, the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 24, para. 55) – the Court has had regard to the manner of appointment of its members and the duration of their term of office (*ibid.*, pp. 24-25, para. 57), the existence of guarantees against outside pressures (see the Piersack judgment of 1 October 1982, Series A no. 53, p. 13, para. 27) and the question whether the body presents an appearance of independence (see the Delcourt judgment of 17 January 1970, Series A no. 11, p. 17, para. 31).

In this context the Court has made clear its position on the presence of civil servants in tribunals. In the Sramek case (22 October 1984, Series A no. 84, para. 41 and 42) the Court paid particular attention to the notion of the subordinate position which civil servants occupy in relation to their hierarchical superiors. After considering the position of the professional judges, the Court went on to state:

> there remain the three civil servants from the Office of the *Land* Government who, in accordance with the 1970/1973 Act (see paragraph 24 above), were, and had to be, included amongst the members of the Regional Authority.
>
> In considering their position, it has to be recalled that it was held in the above-mentioned Ringeisen judgment that the presence of civil servants on the Upper Austrian Regional Commission was compatible with the Convention (Series A no. 13, pp. 39-40, paras. 95-97).
>
> However, the present case is distinguishable from the Ringeisen case in that the Land Government, represented by the Transactions Officer, acquired the status of a party when they appealed to the Regional Authority against the first-instance decision in Mrs Sramek's favour, and in that one of the three civil servants in question had the Transactions Officer as his hierarchical superior (see paragraph 12 above). That civil servant occupied a key position within the [Regional] Authority.
>
> [...]
>
> Where, as in the present case, a tribunal's members include a person who is in a subordinate position, in terms of his duties and the organisation of his service, *vis-à-vis* one of the parties, litigants may entertain a legitimate doubt about that person's independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society (see, *mutatis mutandis*, the above-mentioned Piersack judgment, Series A no. 53, pp. 14-15, para. 30).

The Court therefore found that there had been a violation of Article 6 para. 1 in that case.

Notion of "decision"

Thus an independent and impartial tribunal is necessary to fulfil the conditions of Article 6. But according to the same article this tribunal must also take "decisions". In the Benthem v. the Netherlands judgment (23 October 1985, Series A no. 97, p. 17, para. 40) the Court stressed the importance of the tribunal's decision-making power:

> a power of decision is inherent in the very notion of "tribunal" within the meaning of the Convention (see the Sramek judgment of 22 October 1984, Series A no. 84, p. 17, para. 36).

In the Albert and Le Compte v. Belgium judgment (10 February 1983, Series A no. 58, p. 16, para. 29) the Court defines the extent of the decision-making power, saying that it must satisfy itself that the applicants:

> had the benefit of the "right to a court" (see the above-mentioned Golder judgment, Series A no. 18, p. 18, para. 36) and of a determination by a tribunal of the matters in dispute (see, the above-mentioned König judgment, Series A no. 27, p. 34, para. 98 *in fine*), both for questions of fact and for questions of law.

This means that at least one "tribunal" must be competent to examine and determine questions of fact and of law.

It should be emphasised that in the Court's view there is no decision until the contested situation has been definitively settled. Thus the Court indicated in the Eckle v. Germany case (15 July 1982, Series A no. 51, p. 35, para. 77):

> In the event of conviction, there is no "determination [...] of any criminal charge", within the meaning of Article 6 para. 1, as long as the sentence is not definitively fixed. Thus, in the Ringeisen judgment of 16 July 1971 the Court took as the close of the proceedings the date on which the trial court had decided, following appeal proceedings, that the entire period spent by the applicant in detention on remand should be reckoned as part of the sentence (Series A no. 13, pp. 20 and 45, para. 48 and 110).

Still on the subject of decisions, the Court recalled in the Hiro Balani v. Spain judgment (9 December 1994, Series A no. 303-B, pp. 29-30, para. 27):

> The Court reiterates that Article 6 para. 1 obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument (see the Van de Hurk v. the Netherlands judgment of 19 April 1994, Series A no. 288, p. 20, para. 61). The extent to which this duty to give reasons applies may vary according to the nature of the decision.

4. Character of the procedure before the tribunals

Whatever the extent, the scope and the purpose of the "right to a tribunal", the final consideration is the character of the procedure. It must be fair, take place within a "reasonable time", and fulfil certain criteria governing the deliberations and the pronouncing of the judgment.

Requirement of a fair procedure

The Court has stressed that the procedure provided for in paragraph 1 must be fair. In the Unterpertinger v. Austria case (24 November 1986, Series A no. 110, p. 14, para. 29) it recalled that:

> Those appearing before the Court made their submissions firstly in relation to paragraph 3 (*d*) of Article 6, and then in relation to paragraph 1. The Court recalls that the guarantees contained in paragraph 3 are specific aspects of the general concept of a fair trial set forth in paragraph 1 (see, as the most recent authority, the Bönisch judgment of 6 May 1985, Series A no. 92, pp. 14-15, para. 29).

The Court concluded that because the applicant had been convicted without being given the opportunity to question the witnesses (his wife and stepdaughter) there had been a violation of Article 6 (*ibid*., p. 15, para. 33).

The case of Schenk v. Switzerland, which concerned evidence obtained illegally according to national law, illustrates some principles for ascertaining the fairness of a trial. The Court observed (12 July 1988, Series A no. 140, p. 29, para. 46):

> While Article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.
>
> The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr Schenk's trial as a whole was fair.

In this case the telephone conversations of the applicant were recorded without an order by the competent judge.

The Court has given several more decisions based on this principle. For instance, it has laid down the limits under the Convention for the use of anonymous witnesses. In the Kostovski case (20 October 1989, Series A no. 166, pp. 20-21, paras. 41, 44) the following passages can be found:

> In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument (see the Barberà, Messegué and Jabardo judgment of 6 December 1988, Series A no. 146, p. 34, para. 78). This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained

> at the pre-trial stage is not in itself inconsistent with paragraphs 3 (*d*) and 1 of Article 6, provided the rights of the defence have been respected.
>
> As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings (see, *mutatis mutandis*, the Unterpertinger judgment of 24 November 1986, Series A no. 110, pp. 14-15, para. 31).
>
> [...]
>
> Although the growth in organised crime doubtless demands the introduction of appropriate measures, the Government's submissions appear to the Court to lay insufficient weight on what the applicant's counsel described as "the interest of everybody in a civilised society in a controllable and fair judicial procedure". The right to a fair administration of justice holds so prominent a place in a democratic society (see the Delcourt judgment of 17 January 1970, Series A no. 11, p. 15, para. 25) that it cannot be sacrificed to expediency. The Convention does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants. However, the subsequent use of anonymous statements as sufficient evidence to found a conviction, as in the present case, is a different matter. It involved limitations on the rights of the defence which were irreconcilable with the guarantees contained in Article 6. In fact, the Government accepted that the applicant's conviction was based "to a decisive extent" on the anonymous statements.

In the van Mechelen and Others v. the Netherlands judgment (23 April 1997, Reports of Judgments and Decisions 1997-III, pp. 711-712, paras. 52-55), with reference to the case of Doorson v. the Netherlands (judgment of 26 April 1996, Reports of Judgments and Decisions 1996-II, p. 446), the Court specified the applicable principles in cases where statements of anonymous witnesses are used as evidence:

> As the Court had occasion to state in its Doorson judgment (*ibid*., p. 470, para. 69), the use of statements made by anonymous witnesses to found a conviction is not under all circumstances incompatible with the Convention.

In that same judgment the Court noted the following:

> It is true that Article 6 does not explicitly require the interests of witnesses to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify (see the above-mentioned Doorson judgment, p. 470, para. 70).
>
> However, if the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. Accordingly, the Court has recognised that in such cases Article 6 para. 1 taken together with Article 6 para. 3 (*d*) of the Convention requires that the handicaps under which the defence labours be sufficiently counterbalanced by the procedures followed by the judicial authorities (*ibid*., p. 471, para. 72).
>
> Finally, it should be recalled that a conviction should not be based either solely or to a decisive extent on anonymous statements (*ibid*., p. 472, para. 76).

Anyway, it is not the Court's task to assess the evidence. In the van Mechelen and Others judgment it emphasised again (para. 50):

> The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence

> was taken, were fair (see, among other authorities, the above-mentioned Doorson judgment, p. 470, para. 67).

The principle of a fair procedure has other consequences. Significant among these is the fact that the legislature is prohibited from influencing the progress of a pending case by enacting a law one article of which "was an additional provision to that law and was in reality aimed at [the case in question] – although [the case] was not mentioned by name" (Stran Greek Refineries and Stratis Andreadis v. Greece, 9 December 1994, Series A no. 301-B, p. 81, para. 47).

For other specific examples of the consequences of the principle of fairness, see the Barberà, Mességué and Jabardo v. Spain case (6 December 1988, Series A no. 146).

Adversarial proceedings

In several recent judgments the Court has considered that the right to a "fair trial" entails *inter alia* the right to adversarial proceedings. In the case of Mantovanelli v. France (18 March 1997, Reports of Judgments and Decisions 1997-II, p. 436, para. 33) the applicants complained that they had no opportunity to participate in the preparation of an expert medical report and to submit comments to the documents and the witness evidence taken with regard to the death of their daughter after some surgical operations.

> The Court notes that one of the elements of a fair hearing within the meaning of Article 6 para. 1 is the right to adversarial proceedings; each party must in principle have the opportunity not only to make known any evidence needed for his claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision (see, *mutatis mutandis*, the Lobo Machado v. Portugal and Vermeulen v. Belgium judgments of 20 February 1996, Reports of Judgments and Decisions 1996-I, p. 212, para 31, and p. 234, para. 33, respectively, and the Nideröst-Huber v. Switzerland judgment of 18 February 1997, Reports of Judgments and Decisions 1997, p. 128, para. 24).
>
> In this connection, the Court makes it clear at the outset that, just like observance of the other procedural safeguards enshrined in Article 6 para. 1, compliance with the adversarial principle relates to proceedings in a "tribunal"; no general, abstract principle may therefore be inferred from this provision that where an expert has been appointed by a court, the parties must in all instances be able to attend the interviews held by him or to be shown the documents he has taken into account. What is essential is that the parties should be able to participate properly in the proceedings before the "tribunal" (see, *mutatis mutandis*, the Kerojärvi v. Finland judgment of 19 July 1995, Series A no. 322, p. 16, para. 42 *in fine*)".

In this case the administrative court had complied with the adversarial principle. However, the Court considered *inter alia* that in this case the expert report

> pertained to a technical field that was not within the judges' knowledge. Thus although the Administrative Court was not in law bound by the expert's findings, his report was likely to have a preponderant influence on the assessment of the facts by that court. Under such circumstances, and in the light also of the administrative courts' refusal of their application for a fresh expert report at first instance and on appeal, Mr and Mrs Mantovanelli could only have expressed their views effectively before the expert report was lodged.

Therefore, Article 6 para. 1 was violated in this case.

The right not to incriminate oneself

Although it is not expressly mentioned in Article 6 the right to silence and the right not to incriminate oneself is also guaranteed by this provision. In the case of Saunders v. the United Kingdom (17 December 1996, Reports of Judgments and Decisions 1996-VI, pp. 2064-2065, paras. 68, 69) the applicant was under a legal compulsion to give statements during a statutory investigation into corporate fraud. This investigation was conducted by independent Inspectors of the Companies Act. The applicant's statements were used by the prosecution at the applicant's subsequent criminal trial. With regard to the general principles the Court considered:

> The Court recalls that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (see the Funke v. France judgment of 25 February 1993, Series A no. 256-A, p. 22, para. 44 and the John Murray v. the United Kingdom judgment of 8 February 1996, Reports of Judgments and Decisions 1996-I, p. 49, para. 45). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention.
>
> The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory power but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.

Access to a lawyer

Another aspect of the right to a "fair trial" is access to a lawyer for an accused in the course of (the initial stages of) criminal proceedings. In the John Murray v. the United Kingdom judgment (8 February 1996, Reports of Judgments and Decisions 1996-I, p. 54-55, paras. 62, 63) the applicant was denied access to a lawyer during the first 48 hours of his police detention.

> The Court observes that it has not been disputed by the Government that Article 6 applies even at the stage of the preliminary investigation into an offence by the police. In this respect it recalls it finding in the Imbriosca v. Switzerland judgment of 24 November 1993 that Article 6 – especially paragraph 3 – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (Series A no. 275, p. 13, para. 36). As it pointed out in that judgment, the manner in which Article 6 para. 3 (*c*) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case (*loc. cit*., p. 14, para. 38).
>
> National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing.

Requirement of a judicial procedure which takes place "within a reasonable time"

To be considered fair, proceedings must take place "within a reasonable time".

The reasonableness of the length of proceedings

It should be emphasised that the proceedings must take place within a reasonable time. In this regard, the Court gave the following criteria for determining the reasonableness of the length of proceedings in the Zimmerman and Steiner v. Switzerland judgment (13 July 1983, Series A no. 66, p. 11, para. 24):

> The reasonableness of the length of proceedings coming within the scope of Article 6 para. 1 must be assessed in each case according to the particular circumstances (see the Buchholz judgment of 6 May 1981, Series A no. 42, p. 15, para. 49). The Court has to have regard, *inter alia*, to the complexity of the factual or legal issues raised by the case, to the conducts of the applicants and the competent authorities and to what was at stake for the former; in addition, only delays attributable to the state may justify a finding of a

> failure to comply with the "reasonable time" requirement (see, *mutatis mutandis*, the König judgment of 28 June 1978, Series A no. 27, pp. 34-40, paras. 99, 102-105 and 107-111, and the above-mentioned Buchholz judgment, Series A no. 42, p. 16, para. 49).

The Court reiterated these criteria in, for example, the Vallée v. France case (26 April 1994, Series A no. 289-A, p. 17, para. 34).

The calculation of the period

"Criminal matters"

In the case of Eckle v. Germany (15 July 1982, Series A no. 51, p. 33, para. 73) the Court observed:

> In criminal matters, the "reasonable time" referred to in Article 6 para. 1 begins to run as soon as a person is "charged"; this may occur on a date prior to the case coming before the trial court (see, for example, the Deweer judgment of 27 February 1980, Series A no. 35, p. 22, para. 42), such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened [...].

See, for the definition of "charge" for the purposes of Article 6 para. 1, the above-mentioned Deweer judgment under the notion of "criminal charge".

The Court continued (p. 34, para. 76):

> As regards the end of the "time" in criminal matters the period governed by Article 6 para. 1 covers the whole of the proceedings in issue, including appeal proceedings (see the König judgment of 28 June 1978, Series A no. 27, p. 33, para. 98).

"Civil proceedings"

With regard to "civil proceedings" the Court stated in the Erkner and Hofauer v. Austria judgment (23 April 1987, Series A no. 117, pp. 61-62, paras. 64-65):

> In civil proceedings, the "reasonable time" referred to in Article 6 para. 1 normally begins to run from the moment the action was instituted before the "tribunal"; it is conceivable, however, that in certain circumstances the time may begin to run earlier.

As for the end of the period, the Court notes (Erkner and Hofauer, *loc. cit.*):

> The period whose reasonableness falls to be reviewed takes in the entirety of the proceedings at issue, including any appeals. That period accordingly extends right up to the decision which disposes of the dispute.

The König v. Germany case (28 June 1978, Series A no. 27, p. 33, para. 98) is an example of a case in which the reasonable time began to run "before the issue of the writ commencing proceedings before the court".

Furthermore, the Court has had occasion to make the following point: the length of enforcement proceedings following a judicial decision must be taken into account for the purpose of calculating the reasonable time where the dispute is only definitively settled during this second stage. In the Silva Pontes v. Portugal judgment (23 March 1994, Series A no. 286-A, p. 14, paras. 33-36) the Court made the following observation concerning a debt:

> The Court [...] takes the view [...] that the "enforcement" proceedings were not intended solely to enforce the obligation to pay a fixed amount; they also served to determine important elements of the debt itself [...] It follows that the dispute (*contestation*) over the applicant's right to damages would only have been resolved by the final decision in the enforcement proceedings.
>
> [...]
>
> There can be no doubt that Article 6 applies to [the second stage of the proceedings].

Public hearing and pronouncement of judgments

The final procedural requirements concern the public nature of the hearing and of the giving of judgments.

The importance of the public nature of the hearing

The Court stated in the Pretto and Others v. Italy judgment (8 December 1983, Series A no. 71, pp. 11-12, paras. 21-22) as regards the publicity of judicial proceedings:

> The public character of proceedings for judicial bodies referred to in Article 6 para. 1 protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 para. 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see the Golder judgment of 21 February 1975, Series A no. 18, p. 18, para. 36, and also the Lawless judgment of 14 November 1960, Series A no. 1, p. 13).
>
> Whilst the member States of the Council of Europe all subscribe to this principle of publicity, their legislative systems and judicial practice reveal some diversity as to its scope and manner of implementation, as regards both the holding of hearings and the "pronouncement" of judgments. The formal aspect of the matter is, however, of secondary importance as compared with the purpose underlying the publicity required by Article 6 para. 1. The prominent place held in a democratic society by the right to a fair trial impels the Court, for the purposes of the review which it has to undertake in this area, to examine the realities of the procedure in question (see notably, *mutatis mutandis*, the Adolf judgment of 26 March 1982, Series A no. 49, p. 15, para. 30).

Public pronouncement of judgments

In the same judgment the Court interpreted the requirement of Article 6 para. 1 that "Judgment shall be pronounced publicly". It held (p. 12, para. 26):

> The Court therefore does not feel bound to adopt a literal interpretation. It considers that in each case the form of publicity to be given to the "judgment" under the domestic law of the respondent state must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 para. 1.

In this case the judgments of the Court of Appeal and Court of Cassation had been made public by being deposited in the court registry, whereas anyone could consult or obtain copies of the judgments of the Court of Cassation. The absence of public pronouncement of the Court of Cassation's judgment did not contravene Article 6 para. 1. In the Sutter v. Switzerland case (22 February 1984, Series A no. 74, p. 14-15, paras. 31-34) the judgment of the Military Court of Cassation was served on the parties and moreover anyone who could establish an interest could consult or obtain a full copy of judgments of this court. Therefore, the absence of public pronouncement of the judgment in this case did not violate Article 6 para. 1.

Waiver of a public hearing

In the case of Håkansson and Sturesson v. Sweden (21 February 1990, Series A no. 171-A, p. 20, para. 66) the Court considered:

> The public character of court hearings constitutes a fundamental principle enshrined in paragraph 1 of Article 6. Admittedly neither the letter nor the spirit of this provision prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public (see, *inter alia*, the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 25, para. 59, and the H. v. Belgium judgment of 30 November 1987, Series A no. 127, p. 36, para. 54). However, a waiver must be made in an unequivocal manner and must not run counter to any important public interest.

Article 6 para. 2 – The presumption of innocence

Article 6 para. 2 is worded as follows:

> **2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.**

1. Scope

Article 6 para. 2 is applicable to all persons "charged with a criminal offence".

The Court gave an interpretation, in the Lutz v. Germany judgment (25 August 1987, Series A no. 123, p. 22, para. 52) of, *inter alia*, the notion "charged with a criminal offence". It makes reference to the terms "criminal charge" and "charged with a criminal offence", which appear elsewhere in Article 6, and of which it had already given an interpretation:

> The Court thus proceeded on the basis that in using the terms "criminal charge" (*accusation en matière pénale*) and "charged with a criminal offence" (*accusé, accusé d'une infraction*) the three paragraphs of Article 6 referred to identical situations. It has previously adopted a similar approach to Article 6 para. 2, albeit in a context that was undeniably a criminal one under the domestic law (see the Adolf judgment of 26 March 1982, Series A no. 49, p. 15, para. 30), and the Minelli judgment of 25 March 1983, Series A no. 62, p. 15, para. 27).

Thus the Court applies its usual principles to determine the criminal nature of the offence. In the Minelli v. Switzerland judgment (25 March 1983, Series A no. 62, p. 15, para. 28), the Court held, for example, that the proceedings of a private prosecution for defamation in an article in the newspaper in this case were of a criminal nature.

> The infringement of an individual's "civil" right sometimes also constitutes a criminal offence. To determine whether there is a "criminal charge"/"*accusation en matière pénale*", one has, *inter alia*, to examine the situation of the accused – as it arises under the domestic legal rules in force – in the light of the object of Article 6, namely the protection of the rights of the defence (see the above-mentioned Adolf judgment, *ibid*.).
>
> In Switzerland, defamation is included amongst the offences defined by and punishable under the Federal Criminal Code (see paragraph 17 above). A prosecution for defamation may take place only if the victim has filed a complaint (*Strafantrag*), but the conduct of the prosecution is governed by the Cantonal Codes of Criminal Procedure, in this case that of the Canton of Zürich; the proceedings may lead to penalties, in the shape of a fine or even of imprisonment, which will be entered in the judicial criminal records (see paragraph 18 above).

Article 6 para. 2 is applicable to the whole of the proceedings in the case of a criminal charge. In the Minelli case again, the Court considered (pp. 15-16, para. 30):

> Article 6 para. 2 governs criminal proceedings in their entirety, irrespective of the outcome of the prosecution, and not solely the examination of the merits of the charge (see, *mutatis mutandis*, the above-mentioned Adolf judgment, Series A no. 49, p. 16, para. 33 *in fine*).

Article 6 para. 2 applies to the different public authorities, as shown by the Court's judgment in the Allenet de Ribemont v. France case (judgment of 10 February 1995, Series A no. 308, pp. 16-17, paras. 36, 37 and 41).

> The Court considers that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities.
>
> At the time of the press conference of 29 December 1976 Mr Allenet de Ribemont had just been arrested by the police (see paragraph 9 above). Although he had not yet been charged with aiding and abetting intentional homicide (see paragraph 12 above), his arrest and detention in police custody formed part of

> the judicial investigation begun a few days earlier by a Paris investigating judge and made him a person "charged with a criminal offence" within the meaning of Article 6 para. 2.
>
> [...]
>
> The Court notes that in the instant case some of the highest-ranking officers in the French police referred to Mr Allenet de Ribemont, without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder [...] This was clearly a declaration of the applicant's guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent authority. There has therefore been a breach of Article 6 para. 2.

2. The force of Article 6 para. 2

Article 6 para. 2. Presumption of guilt and of objective criminal responsibility

The Court was asked in the Salabiaku v. France case (7 October 1988, Series A no. 141-A, pp. 15-16, paras. 27-28) to give a judgment about certain presumptions laid down in the French Customs Code relating to the presumption of innocence.

> As the Government and the Commission have pointed out, in principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention (Engel and Others judgment of 8 June 1976, Series A no. 22, p. 34, para. 81) and, accordingly, to define the constituent elements of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States.

In this case the applicant was convicted for being liable for the possession of "smuggled goods" (narcotics) at Roissy airport. This offence appears under the heading "Criminal Liability". Under this provision a conclusion is drawn from a simple fact, which in itself does not necessarily constitute a petty or more serious offence, that the "criminal liability" for the unlawful importation of goods, whether they are prohibited or not, or the failure to declare them, lies with the person in whose possession they are found.

The Court continues:

> This shift from the idea of accountability in criminal law to the notion of guilt shows the very relative nature of such a distinction. It raises a question with regard to Article 6 para. 2 of the Convention.
>
> Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider (paragraph 64 of the report), paragraph 2 of Article 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1. Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words "according to law" were construed exclusively with reference to domestic law. Such a situation could not be reconciled with the object and purpose of Article 6, which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law (see, *inter alia*, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 34, para. 55).
>
> Article 6 para. 2 does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.

In this case the Court concluded that the French courts did not apply the Customs Code in a way which conflicted with the presumption of innocence.

Article 6 para. 2. Content of judgments

In the above-mentioned Minelli judgment the Court stated the following (p. 18, para. 37):

> In the Court's judgment, the presumption of innocence will be violated, if without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty.

In the Minelli case the applicant was ordered by the Swiss court to pay part of the costs of the proceedings, together with compensation to the victims in respect of their expenses, whilst terminating the prosecution on account of limitation to bring the case before the court. The Court concluded that Article 6 para. 2 had been violated. The Swiss Court had concluded in its judgment that, in the absence of limitation, the article in the newspaper complained of would "very probably have led to the conviction".

3. A particular instance: the presumption of innocence and compensation for lawful detention on remand

In the Englert v. Germany judgment (25 August 1987, Series A no. 123, pp. 34-35, paras. 36-37) the Court made some general remarks with regard to a claim for reimbursement of costs and compensation for lawful detention on remand after an acquittal or discontinuance of criminal proceedings and the reasoning of the decision rejecting the claim.

> The Court points out, however, like the Commission and the Government, that neither Article 6 para. 2 nor any other provision of the Convention gives a person "charged with a criminal offence" a right to reimbursement of his costs or a right to compensation for lawful detention on remand where proceedings taken against him are discontinued.

In the same case, the Court turns its attention also to the motives behind a decision to reject.

> Nevertheless, a decision whereby compensation for detention on remand and reimbursement of an accused's necessary costs and expenses are refused following termination of proceedings may rise an issue under Article 6 para. 2 if supporting reasoning which cannot be dissociated from the operative provisions (see the Minelli judgment, p. 18, para. 38) amounts in substance to a determination of the accused's guilt without his having previously been proved guilty according to law and, in particular without his having had an opportunity to exercise the rights of the defence (*ibid*. para. 37).

In this case the Court found that there was no breach of Article 6 para. 2. It took the view that the decisions of the German Courts described "a state of suspicion" and did not amount to a finding of guilt.

On the other hand, in the case of Sekanina v. Austria (25 August 1993, Series A no. 266-A, p. 15-16, paras. 29-30) the applicant was acquitted by a judgment which became final. In their decisions rejecting the applicant's claim for compensation the Austrian Courts undertook an assessment of the applicant's guilt, despite the fact that there had been a final acquittal. In this case Article 6 para. 2 had been violated.

Article 6 para. 3 – Precise rights of the accused

Article 6 para. 3 is worded as follows:

> **3. Everyone charged with a criminal offence has the following minimum rights:**
>
> **a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;**

> **b. to have adequate time and facilities for the preparation of his defence;**
> **c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;**
> **d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;**
> **e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.**

A few examples will suffice.

Article 6 para. 3 (*a*) – The right to be informed of the accusation

In the Kamasinski v. Austria case (19 December 1989, Series A no. 168, pp. 36-37, para. 79) the Court expressed its views on the translation to an alien of the charges against him. In that regard the Court observed that:

> Paragraph 3 (*a*) of Article 6 clarifies the extent of interpretation required in this context by securing to every defendant the right "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". Whilst this provision does not specify that the relevant information should be given in writing or translated in written form for a foreign defendant, it does point to the need for special attention to be paid to the notification of the "accusation" to the defendant. An indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him. A defendant not conversant with the court's language may in fact be put at a disadvantage if he is not also provided with a written translation of the indictment in a language he understands.

Article 6 para. 3 (*b*) – The right to adequate time and facilities to prepare the defence

The Court also stated that Article 6 para. 3 (*b*) did not entitle an accused to have access to the case-file if he was represented by a lawyer (*ibid*., p. 39**,** paras. 87 and 88):

> By virtue of section 45 para. 2 of the Austrian Code of Criminal Procedure, the right to inspect and make copies of the court file is restricted to the defendant's lawyer, the defendant himself only having such access if he is legally unrepresented (see paragraph 48 above).
>
> [...]
>
> The system provided for under section 45 para. 2 of the Austrian Code of Criminal Procedure is not in itself incompatible with the right of the defence safeguarded under Article 6 para. 3 (*b*).

As regards the notion "adequate time" the Court observed in the Campbell and Fell judgment (28 June 1984, Series A no. 80, p. 45, para. 98):

> Mr Campbell was informed of the charges against him on 1 October 1976, five days before the Board sat. He also received "notice of report", those relative to the Board's adjudication having been given to him on the day before it met; the notices drew attention to the fact that he could reply to the charges in writing.
>
> The Court considers that in all circumstances the applicant was left with "adequate time" to prepare his defence; it notes that he apparently did not seek an adjournment of the hearing.

Article 6 para. 3 (*c*) – The right to legal assistance

Article 6 para. 3 (c) from the accused's point of view

In the case of S. v. Switzerland (28 November 1991, Series A no. 220, p. 16, para. 48) the applicant could during his custody not communicate with his lawyer freely and without supervision.

> The Court considers that an accused's right to communicate with his lawyer out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 para. 3 (*c*) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective (see *inter alia* the Artico judgment of 13 May 1908. Series A no. 37, p. 16, para. 33).

In another case (Lala v. the Netherlands, 22 September 1994, Series A no. 298-A, p. 13, para. 33) the Court had occasion to make a very important point concerning the possibility for persons being prosecuted to be represented by a lawyer during criminal trials. In the Lala case the applicant had voluntarily failed to appear at the appeal hearing and the Court of Appeal had "decided the case without his counsel, whom he had charged to conduct the defence and who attended the trial with the clear intention of doing so, being allowed to defend him". The Government claimed, *mutatis mutandis*, that this encouraged those charged with a criminal offence to appear in person. The Court observed:

> As this Court pointed out in its Poitrimol judgment (*loc. cit.*, p. 15, para. 35), in the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial. As a general rule, this is equally true for an appeal by way of rehearing. However, it is also of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first instance and on appeal [...]
>
> In the Court's view the latter interest prevails. Consequently, the fact that the defendant, in spite of having been properly summoned, does not appear, cannot – even in the absence of an excuse – justify depriving him of his right under Article 6 para. 3 of the Convention to be defended by counsel.

Article 6 para. 3 (c) from the state's point of view

The Kamasinski v. Austria case also provided the Court with the opportunity to define the scope of the obligations which Article 6 para. 3 (*b*) imposes on the state. The Court stated (p. 33, para. 65) that:

> Certainly, in itself the appointment of a legal aid defence counsel does not necessarily settle the issue of compliance with the requirements of Article 6 para. 3 (*c*). As the Court stated in its Artico judgment of 13 May 1980: "The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective [...] [M]ere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations" (Series A no. 37, p. 16, para. 33). Nevertheless, "a state cannot be held responsible for every short-coming on the part of a lawyer appointed for legal aid purposes" (*ibid.*, p. 18, para. 36). It follows from the independence of the legal profession from the state that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed [...] [T]he competent national authorities are required under Article 6 para. 3 (*c*) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.

It will be noticed that Article 6 para. 3 (*c*) lays down the right to free legal assistance "when the interests of justice so require". What is meant by "when the interests of justice so require"?

In the case of Quaranta v. Switzerland (24 May 1991, Series A no. 205, p. 17, paras. 32-34) the Court considered:

> In order to determine whether the "interests of justice" required that the applicant receive free legal assistance, the Court will have regard to various criteria.
>
> [...]

> In the first place, consideration should be given to the seriousness of the offence of which Mr Quaranta was accused and the severity of the sentence which he risked. [...] An additional factor is the complexity of the case.

Article 6 para. 3 (d) – The right to question witnesses

As regards witnesses, reference should be made to the characteristics of the proceedings as set out under Article 6 para. 1: character of the procedure for the tribunals.

Article 6 para. 3 (e) – The right to an interpreter

In the Kamasinski v. Austria case the Court recalled what it had previously said concerning the content of the right to the free assistance of an interpreter (*ibid.*, p. 35, para. 74):

> The right, stated in paragraph 3 (c) of Article 6, to the free assistance of an interpreter applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. Paragraph 3 (c) signifies that a person "charged with a criminal offence" who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial (see the *Luedicke, Belkacem and Koç* judgment of 28 November 1978, Series A no. 29, p. 20, para. 48).
>
> However, paragraph 3 (e) does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. The interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events.
>
> In view of the need for the right guaranteed by paragraph 3 (e) to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter, but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided (see, *mutatis mutandis*, the *Artico* judgment previously cited, Series A no. 37, pp. 16 and 18, paras. 33 and 36 – quoted above at paragraph 65).

Article 7 ECHR – No punishment without legislation

Article 7 para. 1 – Prohibition on retroactive application of the criminal law

Article 7 para. 1 is worded as follows:

> **1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.**

1. The scope of Article 7 para. 1

Article 7 does not apply to "preventive" legislation

In the Lawless v. Ireland case (judgment of 1 July 1961, Series A no. 3, p. 54, para. 19) the Court had occasion to explain the scope of Article 7. The Court observed that it did not apply to legislation laying down preventive measures:

> the proceedings show that the Irish Government detained G.R. Lawless under the Offences against the State (Amendment) Act 1940 for the sole purpose of restraining him from engaging in activities prejudicial to the preservation of public peace and order or the security of the state. His detention, being a preventive measure, cannot be deemed to be due to his having been held guilty of a criminal offence within the meaning of Article 7 of the Convention. It follows that Article 7 has no bearing on the case of G.R. Lawless. Therefore, the Irish Government, in detaining G.R. Lawless under the 1940 Act, did not violate their obligation under Article 7 of the Convention.

Article 7 applies to "punitive" legislation"

The notion of punishment

None the less, the Court does not allow the states to avoid the application of Article 7 by describing a measure as they see fit. In connection with the notion of "penalty" the Court held in the Welch v. the United Kingdom case (9 February 1995, Series A no. 307-A, paras. 27 and 28) that:

> The concept of a "penalty" in this provision is, like the notions of "civil rights and obligations" and "criminal charges" in Article 6 para. 1, an autonomous Convention concept [...]. To render the protection offered by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see, *mutatis mutandis*, the Van Droogenbroeck v. Belgium judgment of 24 June 1982, Series A no. 50, p. 20, para. 38, and the Duinhof and Duijf v. the Netherlands judgment of 22 May 1984, Series A no. 79, p. 15, para. 34).
>
> The wording of Article 7 para. 1, second sentence, indicates that the starting point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity.

At issue in the Welch case was a confiscation order in respect of assets acquired from the profits of drug trafficking; the Court held that there had been a violation of Article 7 (*ibid*., para. 35):

> Taking into consideration the combination of punitive elements outlined above, the confiscation order amounted, in the circumstances of the present case, to a penalty. Accordingly, there has been a breach of Article 7 para. 1.

Applying the notion of punishment in cases of imprisonment in default

In the case of Jamil v. France (8 June 1995, Series A no. 317-B, para. 32) the applicant complained of the prolongation of the term of imprisonment in default ordered by the Paris Court of Appeal pursuant to a law enacted after the offence was committed. With regard to the main question whether the imprisonment in default is a penalty within the meaning of the second sentence of Article 7 para. 1 the Court considered as follows.

> The Court notes that the sanction imposed on Mr Jamil was ordered in a criminal-law context – the prevention of drug trafficking. It observes, however, that in France imprisonment in default is not confined to this single, ordinary-law field. As it is a means of enforcing the payment of debts to the Treasury other than those partaking of the nature of civil damages, it can also be attached to penalties for customs or tax offences, among others.
>
> In order to determine how imprisonment in default should be classified for the purposes of Article 7, it is therefore necessary to ascertain its purpose and the rules which govern it. The measure in question is intended to ensure payment of fines, *inter alia*, by insolvency, and its object is to compel such payment by the threat of incarceration under a prison regime. This regime is harsher than for sentences of imprisonment under the ordinary criminal law, mainly because it is not attenuated as they are by such measures as parole or pardon. Imprisonment in default is a survival of the ancient system of imprisonment for debt; it now exists only in respect of debts to the state and does not absolve the debtor from the obligation to pay which led to his committal to prison. Although he can no longer thereafter be compelled to pay by means directed against his person, his goods are still subject to distraint. It is not a measure which can be likened to the seizure of movable or immovable property referred to by the Government.
>
> The sanction imposed on Mr Jamil was ordered by a criminal court, was intended to be deterrent and could have led to a punitive deprivation of liberty (see, *mutatis mutandis*, the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 35, para. 82 and the Özturk v. the Federal Republic of Germany judgment of 21 February 1984, Series A no. 73, p. 20, para. 53). It was therefore a penalty.

2. The content and scope of Article 7 para. 1

Thus Article 7 para. 1 prohibits the retroactive application of the criminal law.

In the S.W. v. the United Kingdom case (22 November 1995, Series A no. 335-B, paras. 34-36) the Court stated the general principles for the interpretation and application of Article 7. In this case the applicant was convicted for the rape of his wife. He complained that he was convicted for an offence which at the relevant time did not constitute a criminal offence. He maintained that the general common-law principle that a husband could not be found guilty of rape upon his wife was still effective when he committed the acts which gave rise to the rape charge. The Court considered:

> The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.
>
> Accordingly, as the Court held in its Kokkinakis v. Greece judgment of 25 May 1993 (Series A no. 260-A, p. 22, para. 52), Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. In its aforementioned judgment the Court added that this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. The Court thus indicated that when speaking of "law" Article 7

> alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements. notably those of accessibility and foreseeability (see, as a recent authority, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, p. 23, para. 37).
>
> However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention states, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.

The Court held that there has been no violation of Article 7 of the Convention in this case. In addition it took into account:

> the abandonment of the unacceptable idea of an husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom (para. 44 of the judgment).

Sanction where there has been a violation of Article 7

The first consequence is that there is a violation of the article. In the Jamil case cited above the Court concluded that there had been a breach of Article 7 para. 1. Mr Jamil was convicted of a penalty which did not exist at the time when the offences were committed and the law on the prevention of drug trafficking was applied retrospectively.

In the above-mentioned Welch case the Court concluded that there had been a breach of Article 7 para. 1. However, it went on to state (9 February 1995, para. 36) that:

> this conclusion concerns only the retrospective application of the relevant legislation and does not call into question in any respect the powers of confiscation conferred on the courts [for its non-retroactive application].

Article 7 para. 2 – Derogation

Article 7 para. 2 is worded as follows:

> **2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.**

The derogation in this provision refers to the Nuremberg principles in the event of war crimes and crimes against humanity.

Article 8 ECHR – The right to respect for private and family life

Article 8 para. 1

Article 8 para. 1 is worded as follows:

> **1. Everyone has the right to respect for his private and family life, his home and his correspondence.**

1. The scope of Article 8 para. 1

The first consequence of Article 8 para. 1 is that the state must refrain from any interference. This follows from paragraph 2, which provides that "there shall be no interference by a public authority".

However, it is not only an "interference" that can entail a violation of Article 8. A simple failure to act on the part of the state may have the same effect. Member states must ensure effective respect for the rights established in the Convention. In that regard, the Court summarised in the Airey v. Ireland case (judgment of 9 October 1979, Series A no. 32, p. 17, paras. 32 and 33) the principles laid down in the earlier Marckx case. It will be recalled that in that case Mrs Airey had been unable to institute judicial separation proceedings in the absence of legal aid in Ireland. The Court stated that:

> The Court does not consider that Ireland can be said to have "interfered" with Mrs Airey's private or family life: the substance of her complaint is not that the state has acted but that it has failed to act. However, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (see the above-mentioned Marckx judgment, p. 15, para. 31).
>
> In Ireland, many aspects of private or family life are regulated by law. As regards marriage, husband and wife are in principle under a duty to cohabit but are entitled, in certain cases, to petition for a decree of judicial separation; this amounts to recognition of the fact that the protection of their private or family life may sometimes necessitate their being relieved from the duty to live together.
>
> Effective respect for private or family life obliges Ireland to make this means of protection effectively accessible, when appropriate, to anyone who may wish to have recourse thereto. However, it was not effectively accessible to the applicant: not having been put in a position in which she could apply to the High Court, she was unable to seek recognition in law of her *de facto* separation from her husband. She has therefore been the victim of a violation of Article 8.

In the Rees v. the United Kingdom case (judgment of 17 October 1986, Series A no. 106, p. 15, para. 37) the Court explained how to determine whether or not a positive obligation exists.

> In determining whether or not a positive obligation exists, regard must be had to a fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention (see, *mutatis mutandis*, amongst others, the James and Others judgment of 21 February 1986, Series A no. 98, p. 34, para. 50, and the Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p. 26, para. 69). In striking this balance the aims mentioned in the second paragraph of Article 8 may be of a certain relevance, although this provision refers in terms only to "interferences" with the right protected by the first paragraph – in other words is concerned with the negative obligations flowing therefrom (see, *mutatis mutandis*, the Marckx judgment of 13 June 1979, Series A no. 31, p. 15, para. 31).

So the Court gives a useful indication of the difference between positive and negative obligations. However, in a more recent judgment it stressed the lack of precision attached to this distinction and the determination of the positive obligation of the state resulting from it: (Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, p. 19, para. 49):

> The Court recalls that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in an effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, none the less, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, for example, the Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, p. 18, para. 41, and the Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 25, para. 55).

2. The notions of Article 8 para. 1

In order to examine the scope of Article 8 para. 1 we must look one by one at the different terms it refers to: "private life", "family life", "home" and "correspondence"

The sphere of application of Article 8 to private life

In the case of Niemietz v. Germany (judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, para. 29) the law office of the applicant was searched by the public prosecutor's office and the police for documents which could reveal the identity of the person who had insulted a certain person. In its judgment the Court gave an elaborate statement of the notion "private life".

> The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.
>
> There appears furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that, as was rightly pointed out by the Commission, it is not always possible to distinguish clearly which of an individual activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time.
>
> To deny the protection of Article 8 on the ground that the measure complained of related only to professional activities – as the Government suggested should be done in the present case – could moreover lead to an inequality of treatment, in that such protection would remain available to a person whose professional and non-professional activities were so intermingled that there was no means of distinguishing between them. In fact, the Court has not therefore drawn such distinctions: it concluded that there had been an interference with private life even where telephone tapping covered both business and private calls (see the Huvig v. France judgment of 24 April 1990, Series A no. 176-B, p. 41, para. 8 and p. 52, para. 25; and where a search was directed solely against business activities, it did not rely on that fact as a ground for excluding the applicability of Article 8 under the head of "private life" (see the Chappell v. the United Kingdom judgment of 30 March 1989, Series A no. 152-A, pp. 12-13, para. 26, and pp. 21-22, para. 51).

The sphere of application of Article 8 to the notion home

In the above-mentioned judgment Niemietz v. Germany the Court gave also an interpretation of the notion "home" in Article 8 para. 1 (p. 34, paras. 30-31).

> As regards the word "home", appearing in the English text of Article 8, the Court observed that in certain Contracting States, notably Germany (see paragraph 18 above), it has been accepted as extending to business premises. Such an interpretation is, moreover, fully consonant with the French text, since the

> word "domicile" has a broader connotation than the word "home" and may extend, for example, to a professional person's office.
>
> In this context also, it may not always be possible to draw precise distinctions, since activities which are related to a profession or business may well be conducted from a person's private residence and activities which are not so related may well be carried on in an office or commercial premises. A narrow interpretation of the words "home" and "domicile" could therefore give rise to the same risk of inequality of treatment as narrow interpretation of the notion of "private life (see paragraph 29 above).
>
> More generally, to interpret the words "private life" and "home" as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8, namely, to protect the individual against arbitrary interference by the public authorities (see, for example, the Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, p. 15, para. 31). Such an interpretation would not unduly hamper the Contracting States, for they would retain their entitlement to "interfere" to the extent permitted by paragraph 2 of Article 8; that entitlement might be well more far-reaching where professional or business activities or premises were involved than would otherwise be the case.

In the case of Buckley v. the United Kingdom (25 September 1996, Reports of Judgments and Decisions 1996-IV, pp. 1287-1288, para. 54) the applicant, who is a gypsy, was refused a planning permission which would enable her to live in a caravan on land which she owns with her family. With reference to its Gillow judgment the Court observed with regard to the applicability of Article 8 of the Convention:

> The Court, in its Gillow v. the United Kingdom judgment of 24 November 1986 (Series A no. 109), noted that the applicants had established the property in question as their home, had retained ownership of it intending to return there, had lived in it with a view to taking up permanent residence, had relinquished their other home and had not established any other in the United Kingdom. That property was therefore to be considered their "home" for the purposes of Article 8 (*loc. cit*., p. 19, para. 46).
>
> Although in the Gillow case the applicant's home had initially been established legally, similar considerations apply in the present case. The Court is satisfied that the applicant bought the land to establish her residence there. She has lived there almost continuously since 1988 – save for an absence of two weeks, for family reasons, in 1993 (see paragraphs 11 and 13 above) – and it has not been suggested that she has established, or intends to establish, another residence elsewhere. The case therefore concerns the applicant's right to respect for her "home".

The sphere of application of Article 8 to the notion correspondence

Article 8 is also designed to apply to the breach of the right to respect for correspondence.

In the Campbell v. the United Kingdom case the applicant complained that correspondence to and from his solicitor and the European Commission of Human Rights was opened and read by the prison authorities in breach of Article 8. In its judgment of 25 March 1992, Series A no. 233, p. 16, para. 33 the Court:

> notes in the first place that from the outset in his application to the Commission of 14 January 1986 the applicant complained that "his correspondence with his solicitors and the European Commission of Human Rights has regularly been subjected to interference in so far as it has been opened, perused, scrutinised and censored by the prison authorities". He added that he was restricted in his contacts with his solicitor and the Commission because he knew that "his correspondence will be read [...] and noted by the prison authorities". The Court further observes that the Government did not dispute that the applicant's incoming and outgoing correspondence with his solicitor, other than that concerning a petition to the Commission, could be examined under the Prison Rules. Indeed, the SHHD had informed the applicant and his solicitor that this correspondence was subject to the existing rules which provided for the opening and reading of such letters (see paragraphs 13-14 above). In these circumstances, the applicant can claim to be a victim of an interference with his right to respect for correspondence under Article 8.

The Court found in this case that there was no pressing social need for the opening and reading of the applicant's correspondence with his solicitor and that the opening of letters from the Commission was "not necessary in a democratic society" within the meaning of Article 8 para. 2.

Reference can also be made to the Silver and others v. the United Kingdom judgment (25 March 1983, Series A no. 61, p. 40, para. 103), where the Court accepted the derogation in Article 8 para. 2. The Court took the view that the prison authorities could stop the letters of one of the prisoners in order to maintain the necessary prevention of disorder. It observed, *inter alia*:

> Mr Cooper's letters Nos. 28-31 were stopped not only for employing grossly improper language but also for containing threats of violence (see paragraph 45 (*a*), item (iv), and 65 above). His counsel contested the Commission's view that the interference was "necessary" on the second ground.
>
> The Court agrees with the Commission. Letters Nos. 28-30 contained clear threats and letter No. 31 can be regarded as a continuation thereof. In the Court's judgment, the authorities had sufficient reason for concluding that the stopping of these letters was necessary "for the prevention of disorder or crime", within the meaning of Article 8 (2).

The sphere of application of Article 8 to the notion family life

Article 8 applies to families irrespective of their legal status

The Court observed in the Marckx v. Belgium judgment (13 June 1979, Series A no. 31, p. 14, para. 31) that no distinction must be drawn according to the status of the family for the purpose of applying Article 8:

> The Court concurs entirely with the Commission's established case-law on a crucial point, namely that Article 8 makes no distinction between the "legitimate" and the "illegitimate" family. Such a distinction would not be consonant with the word "everyone", and this is confirmed by Article 14 with its prohibition, in the enjoyment of the rights and freedoms enshrined in the Convention, of discrimination grounded on "birth". In addition, the Court notes that the Committee of Ministers of the Council of Europe regards the single woman and her child as one form of family no less than others (Resolution (70) 15 of 15 May 1970 on the social protection of unmarried mothers and their children, para. I-10, para. II-5, etc.).

There is one qualification to this case-law: as the Court points out, the "family life" must be deemed to exist already.

Article 8 applies only to families already existing

Article 8 protects family life only as an existing state. It does not cover the freedom to found a family – which comes under Article 12. In the Marckx v. Belgium case quoted above (13 June 1979, Series A no. 31, p. 14 para. 31) the Court notes clearly:

> By guaranteeing the respect for family life, Article 8 presupposes the existence of a family.

In the case of Abdulaziz, Cabales and Balkandali v. the United Kingdom the husbands of the applicants were not permitted to remain with or join their wives, who were lawfully and permanently settled in the United Kingdom. In its judgment of 28 May 1985, Series A no. 94, p. 32, para. 62, the Court held that the "presupposition of the existence of a family":

> does not mean that all intended family life falls entirely outside its ambit. Whatever else the word "family life" means, it must at any rate include the relationship that arises from a lawful and genuine marriage, such as that contracted by Mr and Mrs Abdulaziz and Mr amd Mrs Balkandali, even if a family life of the kind referred to by the Government has not yet been fully established. Those marriages must be considered sufficient to attract such respect as my be due under Article 8.
>
> Furthermore, the expression "family life", in the case of a married couple, normally comprises cohabitation. The latter proposition is reinforced by the existence of Article 12, for it is scarcely conceivable that the right to found a family should not encompass the right to live together.

In the Berrehab v. the Netherlands judgment (21 June 1988, Series A no. 138, p. 14, para. 21), the Court considered that cohabitation is not always necessary for "family life" within the meaning of Article 8. The case concerned a family with a child, where the parents were no longer living together. The Court stated:

> The Court likewise does not see cohabitation as a *sine qua non* of family life between parents and minor children. It has held that the relationship created between the spouses by a lawful and genuine marriage – such as that contracted by Mr and Mrs Berrehab – has to be regarded as "family life" (see the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, cited above). It follows from the concept of family on which Article 8 is based that a child born of such a union is *ipso jure* part of that relationship; hence from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to "family life", even if the parents are not then living together.
>
> Subsequent events, of course, may break that tie, but this was not so in the instant case.

See for the compliance with Article 8 in this case below under examples of the application of Article 8 in family matters.

The Court has had other opportunities to rule on the existence of "family life" within the meaning of Article 8. In the McMichael v. the United Kingdom case (24 February 1995, Series A no. 307-B) the proceedings before the Court had been brought by two applicants, the natural father and mother of a child. The mother's parental rights had been withdrawn on account of her mental state and the fact that she had been compulsorily admitted to psychiatric hospitals. The natural father had sought right of access and then parental authority by using the channels of appeal available before the British panels with jurisdiction in child placement matters. As the child had been born out of wedlock the Scottish legal system did not automatically grant the natural father parental rights; nor had the father made an application to the court for an order for parental rights, as he could have done.

Faced with that situation, the Court had no alternative but to find that Article 6 did not apply in his case with regard to the father:

> the care proceedings in question did not involve the determination of any of those rights, since he had not taken the requisite prior step of seeking to obtain legal recognition of his status as a father (para. 77).

Without finding any contradiction, however, the Court held that Article 8 applied to him. As regards Articles 6 and 8 taken together (*ibid*., para. 91), the Court stated that there was no contradiction between the existence of a "family life" protected by Article 8 and the absence of a right to be protected by Article 6.

> [...] the Court would point to the difference in the nature of the interests protected by Articles 6 para. 1 and 8. [...]. The difference between the purpose pursued by the respective safeguards afforded by Articles 6 para. 1 and 8 may, in the light of the particular circumstances, justify the examination of the same set of facts under both Articles (compare, for example, the above-mentioned Golder v. the United Kingdom judgment, pp. 20-22, paras. 41-45, and the O. v. the United Kingdom judgment of 7 July 1987, Series A no. 120-A, pp. 28-29, paras. 65-67).

The Court therefore took account of the reality, rather than the legality, of the situation. None the less, it should be pointed out that the father married the mother while the case was pending, a factor which the Court necessarily took into account in determining the existence of family life:

> it is true that at the outset, in late 1987 and early 1988, the second applicant denied the first applicant's paternity of A and that the initial [...] children's hearing occurred two weeks before the first applicant's name had been added to A.'s birth certificate (4 and 18 February 1988 respectively) (see paragraphs 7, 11, 14, 15 and 18 above). However, the first applicant had claimed paternity on 27 January 1988; and even at the time of this initial children's hearing he was living with the second applicant and was, especially in his capacity as her representative, closely associated in the attempt to obtain access to A. [...]. During the relevant period taken as a whole they were living together and leading a joint "family life", to the extent that that was possible in the light of the second applicant's periodic hospitalisation (see paragraphs 16 and 30 above) (para. 90).

Lastly, it should be mentioned that relationships with brothers or sisters or with grandparents fall within the sphere of family life. In the Marckx judgment (*ibid*., para. 45) the Court observed that:

> "family life", within the meaning of Article 8, includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life.

3. Examples of the application of Article 8 in family matters

Provided that there is a "family life", respect for it implies a great variety of consequences for the state. For example, the procedure followed where a child is placed in care must possess certain characteristics in order to comply with Article 8. Thus in the W. v. the United Kingdom case (8 July 1987, Series A no. 121, p. 29, para. 64) the Court observed:

> what has to be determined is whether [...] the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as "necessary" within the meaning of Article 8.

In another case (the Berrehab v. the Netherlands case, 21 June 1988, Series A no. 138, p. 16, para. 29) the Court considered that the expulsion of an alien by the Netherlands following his divorce from a Netherlands national by whom he had a child did not satisfy the criterion of proportionality in relation to the aim pursued which is required by paragraph 2 of Article 8 in the event of interference with family life, where that alien had close ties with his daughter. The Netherlands defended the expulsion as being necessary for the protection of the employment market and the economic welfare of the country. The Court observed that:

> As to the aim pursued, it must be emphasised that the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, Mr Berrehab already had real family ties there – he had married a Dutch woman, and a child had been born of the marriage.
>
> As to the extent of the interference, it is to be noted that there had been very close ties between Mr Berrehab and his daughter for several years (see paragraphs 9 and 21 above) and that the refusal of an independent residence permit and the ensuing expulsion threatened to break those ties. That effect of the interferences in issue was the more serious as Rebecca needed to remain in contact with her father, seeing especially that she was very young.
>
> Having regard to these particular circumstances, the Court considers that a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued. That being so, the Court cannot consider the disputed measures as being necessary in a democratic society. It thus concludes that there was a violation of Article 8.

4. Other situations in which Article 8 can apply

The potential situations in which Article 8 can apply are very important. It is impossible to give an exhaustive list in a document like this, but the following is an attempt at illustrating the diversity of the situations in which Article 8 para. 1 is applied.

Article 8 and the right to a name

The Court has applied Article 8 to a surname. In the Burghartz v. Switzerland case the applicants "complained that the authorities had withheld from Mr Burghartz the right to put his own surname before their family name although Swiss law afforded that possibility to married women who had chosen their husband's surname as their family name". In its judgment of 22 February 1994, Series A no. 280-B, p. 28, para. 24, the Court observed as regards the applicability of Article 14 taken together with Article 8:

> Unlike some other international instruments, such as the International Covenant on Civil and Political Rights (Article 24 para. 2), the Convention on the Rights of the Child of 20 November 1989 (Articles 7 and 8) or the American Convention on Human Rights (Article 18), Article 8 of the Convention does not contain any explicit provisions on names. As a means of personal identification and of linking to a family, a person's name none the less concerns his or her private life and family life. The fact that society and the state have an interest in regulating the use of names does not exclude this, since these public-law aspects are compatible with private life conceived of as including, to a certain degree, the right to establish and develop relations with other human beings, in professional or business contexts as in others (see, *mutatis mutandis*, the Niemietz v. Germany judgment of 16 December 1992, Series A no. 251-B, p. 33, para. 29).
>
> In the instant case, the applicant's retention of the surname by which, according to him, he has become known in academic circles may significantly affect his career. Article 8 therefore applies.

As regards the compliance with Articles 14 and 8 taken together the Court considered (pp. 28-30, paras. 25, 27 and 29):

> Mr and Mrs Burghartz complained that the authorities had withheld from Mr Burghartz the right to put his own surname before their family name although Swiss law afforded that possibility to married women who had chosen their husband's surname as their family name. They said that this resulted in discrimination on the ground of sex, contrary to Articles 14 and 8 taken together.
>
> [...]
>
> The Court reiterates that the advancement of the equality of the sexes is today a major goal in the member states of the Council of Europe; this means that very weighty reasons would have to be put forward before a difference of treatment on the sole ground of sex could be regarded as compatible with the Convention (see, as the most recent authority, the Schuler-Zgraggen v. Switzerland judgment of 24 June 1993, Series A no. 263, pp. 21-22, para. 67).
>
> [...]
>
> [...] the difference of treatment complained of lacks an objective and reasonable justification and accordingly contravenes Article 14 taken together with Article 8.

But the application of Article 8 to surnames is none the less limited. In the Stjerna v. Finland case (judgment of 25 November 1994, Series A no. 299-B, pp. 60-61, para. 38, 39), the Court repeated the applicability of Article 8 to names. Considerations of public interest regarding the stability of the surname may be more important than the desire of the applicant to change his name: The Court gave its opinion that:

> the refusal of the Finnish authorities to allow the applicant to adopt a specific new surname cannot, in the view of the Court, necessarily be considered an interference in the exercise of his right to respect for his private life, as would have been, for example, an obligation on him to change surname. [...]
>
> Despite the increased use of personal identity numbers in Finland and in other Contracting States names retain a crucial role in the identification of people. Whilst therefore recognising that there may exist genuine reasons prompting an individual to wish to change his or her name, the Court accepts that legal restrictions on such a possibility may be justified in the public interest; for example in order to ensure accurate population registration or to safeguard the means of personal identification and of linking the bearers of a given name to a family.

Having regard to the circumstances of this case the Court found the sources of inconvenience the applicant complained of – i.e. the difficulties in the spelling and pronunciation of his Swedish name in Finland and the possibility of turning his name into a pejorative nickname – not sufficient in order to conclude that the refusal of the Finnish authorities did constitute a lack of respect for his private life. Accordingly, Article 8 had not been violated.

In the Guillot v. France judgment (24 October 1996, Reports of Judgments and Decisions 1996-V, pp. 1602-1603, paras. 21-22) the Court considered that Article 8 is also applicable to forenames.

> The Court notes that Article 8 does not contain any explicit provisions on forenames. However, since they constitute a means of identifying persons within their families and the community , forenames like surnames (see *mutatis mutandis*, the Burghartz v, Switzerland judgment of 22 February 1994, Series A no. 280-B, p. 28, para. 24, and the Stjerna v. Finland judgment of 25 November 1994, Series A no. 299-B, p. 60, para. 37), do concern private and family life.
>
> Furthermore, the choice of a child's forename by its parents is a personal, emotional matter and therefore comes within their private sphere. The subject-matter of the complaint thus falls within the ambit of Article 8, and indeed this was not contested.

The applicants wanted to give their daughter the name "Fleur de Marie". The registrar of births, deaths and marriages refused to register this name, since it did not appear in any calendar of saints' days. The Court concluded that Article 8 has not been violated. The child could regularly use the forename in issue without hindrance and the applicants were allowed by the French courts to register the forename as "Fleur-Marie".

Article 8 and sexual identity

General observation

In the case of X and Y v. the Netherlands, judgment of 26 March 1985, Series A no. 91, p. 11, para. 22, the Court considered that the notion of "private life" is " a concept which covers the physical and moral integrity of the person, including his or her sexual life".

Homosexuals

The Court has held that the maintenance in force of legislation which has the effect of making homosexual acts between consulting adult males – i.e. over the age of 21 years – in private criminal offences constitutes a continuing – and in this case unjustified – interference with the applicants' right to respect for private life. (Dudgeon v. the United Kingdom, judgment of 22 October 1981, Series A no. 45, p. 24, paras. 60-61).

Transsexuals

The Court has also dealt with the question of transsexualism. In the B. v. France case (25 March 1992, Series A no. 232-C, p. 52, para. 58) it took the view that there had been a breach of Article 8 with regard to a transsexual who had not succeeded in having his masculine civil status altered on his official documents. In that case the Court stated that:

> The judgments supplied to the Court by the Government do indeed show that non-recognition of the change of sex does not necessarily prevent the person in question from obtaining a new forename which will better reflect his or her physical appearance.
>
> However, this case-law was not settled at the time when the Libourne and Bordeaux courts gave their rulings. Indeed, it does not appear to be settled even today, as the Court of Cassation has apparently never had an occasion to confirm it.

The Court thus accepted the applicant's argument that the indication of her – original – sex in official documents, administrative documents (INSEE number[1]) etc. was the source of daily problems in her private life. While reaching its conclusion, the Court observed (pp. 53-54, paras. 62 and 63) that:

> the inconveniences complained of by the applicant in this field reach a sufficient degree of seriousness to be taken into account for the purposes of Article 8.
>
> The Court [...] reaches the conclusion, on the basis of the above-mentioned factors which distinguish the present case from the Rees and Cossey cases and without it being necessary to consider the applicant's arguments, that she finds herself daily in a situation which, taken as a whole, is not compatible with the respect due to her private life. Consequently, even having regard to the State's margin of appreciation, the

1. Translator's note: the number allocated to each person by the *Institut national de la statistique et des études économiques* (National Institute for Statistics and Economic Studies); the first digit indicates the person's sex and the number is widely used, being, *inter alia*, the basis of the social security number.

> fair balance which has to be struck between the general interest and the interests of the individual has not been attained, and there has thus been a violation of Article 8.
>
> The respondent State has several means to choose from for remedying this state of affairs. It is not the Court's function to indicate which is the most appropriate [...]

Thus the Court does not impose on the state the obligation to accept a change of sex in official documents. The state must, however, take measures of its choosing to remedy the violation of Article 8 that results from the situation the applicant finds herself in.

In the case of X, Y and Z v. the United Kingdom (22 April 1997, Reports of Judgments and Decisions 1997-II, pp. 632, 635, paras. 42, 52), the applicant X, who is a female-to-male transsexual, was not permitted to be registered as father of the child that was born to his partner Y by artificial insemination with sperm from an anonymous donor. After having established that in this case there is "family life" within the meaning of Article 8 of the Convention, the Court considered:

> The present case is distinguishable from the previous cases concerning transsexuals which have been brought before the Court (see the [...] Rees judgment [of 17 October 1986, Series A no. 106], the [...] Cossey judgment [of 27 September 1990, Series A no. 184] and the B. v. France judgment of 25 March 1992, Series A no. 232-C), because here the applicants' complaint is not that the domestic law makes no provision for the recognition of the transsexual's change of identity, but rather that it is not possible for such a person to be registered as the father of a child; indeed, it is for this reason that the Court is examining this case in relation to family, rather than private, life (see paragraph 37 above).

In the judgment the Court observed that there is no common standard with regard to the granting of parental rights to transsexuals. It concluded (para. 52):

> [...] given that transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States, the Court is of the opinion that Article 8 cannot, in this context, be taken to imply an obligation for the respondent state formally to recognise as the father of a child a person who is not the biological father. That being so, the fact that the law of the United Kingdom does not allow special legal recognition of the relationship between X and Z does not amount to a failure to respect family life within the meaning of that provision.

Sado-masochistic activities

Although the Court has stated that the sexual life of a person is protected by Article 8 of the Convention, it observed in the Laskey, Jaggard and Brown v. the United Kingdom judgment (19 February 1997, Reports of Judgments and Decisions 1997-I, pp. 131-133, paras. 36, 43, 44, 45, 46, 49) that:

> [...] not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8. In the present case, the applicants were involved in consensual sado-masochistic activities for purposes of sexual gratification. There can be no doubt that sexual orientation and activity concern an intimate aspect of private life (see, *mutatis mutandis*, the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, p. 21, para. 52). However, a considerable number of people were involved in the activities in question which included, *inter alia*, the recruitment of new "members", the provision of several specially-equipped "chambers", and the shooting of many videotapes which were distributed among the "members" (see paragraphs 8 and 9 above). It may thus be open to question whether the sexual activities of the applicants fell entirely within the notion of "private life" in the particular circumstances of the case.
>
> However, since this point has not been disputed by those appearing before it, the Court sees no reason to examine it of its own motion in the present case. Assuming, therefore, that the prosecution and conviction of the applicants amounted to an interference with their private life, the question arises whether such an interference was "necessary in a democratic society" within the meaning of the second paragraph of Article 8.
>
> [...]

> The Court considers that one of the roles which the State is unquestionably entitled to undertake is to seek to regulate, through the operation of the criminal law, activities which involve the infliction of physical harm. This is so whether the activities in question occur in the course of sexual conduct or otherwise.
>
> The determination of the level of harm that should be tolerated by the law in situations where the victim consents is in the first instance a matter for the state concerned since what is at stake is related, on the one hand, to public health considerations and to the general deterrent effect of the criminal law, and, on the other, to the personal autonomy of the individual.
>
> The applicants have contended that, in the circumstances of the case, the behaviour in question formed part of private morality which is not the State's business to regulate. In their submission the matters for which they were prosecuted and convicted concerned only private sexual behaviour.
>
> The Court is not persuaded by this submission. It is evident from the facts established by the national courts that the applicants' sado-masochistic activities involved a significant degree of injury or wounding which could not be characterised as trifling or transient. This, in itself, suffices to distinguish the present case from those applications which have previously been examined by the Court concerning consensual homosexual behaviour in private between adults where no such feature was present (see the Dudgeon v. the United Kingdom judgment cited above, the Norris v. Ireland judgment of 26 October 1988, Series A no. 142, and the Modinos v. Cyprus judgment of 22 April 1993, Series A no. 259).
>
> Nor does the Court accept the applicants' submission that no prosecution should have been brought against them since their injuries were not severe and since no medical treatment had been required.
>
> In deciding whether or not to prosecute, the state authorities were entitled to have regard not only to the actual seriousness of the harm caused – which as noted above was considered to be significant – but also, as stated by Lord Jauncey of Tullichettle (see paragraph 21 above), to the potential for harm inherent in the acts in question. In this respect it is recalled that the activities were considered by Lord Templeman to be "unpredictably dangerous" (see paragraph 20 above).

The Court held that in this case Article 8 of the Convention was not violated. It noted that:

> [...] the charges of assault were numerous and referred to illegal activities which had taken place over more than ten years. However, only a few charges were selected for inclusion in the prosecution case. It further notes that, in recognition of the fact that the applicants did not appreciate their actions to be criminal, reduced sentences were imposed on appeal (see paragraphs 15-17 above). In these circumstances, bearing in mind the degree of organisation involved in the offences, the measures taken against the applicants cannot be regarded as disproportionate.

Surveillance

Surveillance by telephone tapping

In the Malone v. the United Kingdom case (2 August 1984, Series A no. 82, pp. 30-33, paras. 64, 65, 66, 67 and 68) the Court was once again required to rule on telephone tapping. It first of all found that there had been an interference with the applicant's rights under Article 8, then ascertained whether the interference was justified under the terms of Article 8 para. 2. The Court stated that:

> It was common ground that one telephone conversation to which the applicant was a party was intercepted at the request of the police under a warrant issued by the Home Secretary. As telephone conversations are covered by the notions of "private life" and "correspondence" within the meaning of Article 8 (see the Klass and Others judgment of 6 September 1978, Series A no. 28, p. 21, para. 41), the admitted measure of interception involved an "interference by a public authority" with the exercise of a right guaranteed to the applicant under paragraph 1 of Article 8.
>
> [...]
>
> The principal issue of contention was whether the interferences found were justified under the terms of paragraph 2 of Article 8, notably whether they were "in accordance with the law" and "necessary in a democratic society" for one of the purposes enumerated in that paragraph.

[...]

The first such principle was that the word "law/*loi*" is to be interpreted as covering not only written law but also unwritten law (see the *Sunday Times* judgment of 26 April 1979, p. 30, para. 47). A second principle, recognised by Commission, Government and applicant as being applicable in the present case, was that "the interference in question must have some basis in domestic law" (see the Silver and Others judgment of 25 March 1983, p. 33, para. 86). The expressions in question were, however, also taken to include requirements over and above compliance with the domestic law [...]

The Court would reiterate its opinion that the phrase "in accordance with the law" does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention (see, *mutatis mutandis*, the above-mentioned Silver and Others judgment, p. 34, para. 90, and the Golder judgment of 21 February 1975, Series A no. 18, p. 17, para. 34). The phrase thus implies – and this follows from the object and purpose of Article 8 – that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 (see the report of the Commission, para. 21). Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident (see the above-mentioned Klass and Others judgment, Series A no. 28, pp. 21 and 23, paras. 42 and 49) [...] [Therefore] the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.

In the Malone case the Court considered that the impugned law was not sufficiently precise – in that it did not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities – and did not deem it necessary to examine the other conditions of paragraph 2.

Surveillance by metering

In the same decision the Court held that metering also amounted to an interference with a right guaranteed by Article 8 (*ibid*., pp. 37-38, paras. 83, 84):

The process known as "metering" involves the use of a device (a meter check printer) which registers the numbers dialled on a particular telephone and the time and duration of each call (see paragraph 56 above).

[...]

As the Government rightly suggested, a meter check printer registers information that a supplier of a telephone service may in principle legitimately obtain, notably in order to ensure that the subscriber is correctly charged or to investigate complaints or possible abuses of the service. By its very nature, metering is therefore to be distinguished from interception of communications, which is undesirable and illegitimate in a democratic society unless justified. The Court does not accept, however, that the use of data obtained from metering, whatever the circumstances and purposes, cannot give rise to an issue under Article 8. The records of metering contain information, in particular the numbers dialled, which is an integral element in the communications made by telephone. Consequently, release of that information to the police without the consent of the subscriber also amounts, in the opinion of the Court, to an interference with a right guaranteed by Article 8.

The Court found this practice not "in accordance with the law", within the meaning of paragraph 2 of Article 8.

Information-gathering activities

The Court has also ruled on information-gathering activities. In the Leander v. Sweden judgment (26 March 1987, Series A no. 116, pp. 22, 25-27, paras. 48, 60, 65, 67) the Court held that the impugned information-gathering activities constituted a violation of Article 8 para. 1. In that case Mr Leander had been refused a post in a naval base in the light of information obtained about him by the State services.

The information-gathering activity in question was held to be necessary in a democratic society for the maintenance of national security. The Court observed that:

> It is uncontested that the secret police-register contained information relating to Mr Leander's private life.
>
> Both the storing and the release of such information, which were coupled with a refusal to allow Mr Leander an opportunity to refute it, amounted to an interference with his right to respect for private life as guaranteed by Article 8 para. 1.

But in developing its reasoning, the Court ruled that this interference was justified under paragraph 2. The Swedish Government claimed that the register in question was intended to assist in appointing candidates to a post on a naval base, and argued security considerations. The Court accepted this position, judging that the holding of information concerning Mr Leander was necessary for maintaining national security in a democratic society.

Nevertheless, the Court insisted that the existence and use of such a register should be subject to safeguards:

> in view of the risk that a system of secret surveillance for the protection of national security poses of undermining or even destroying democracy on the ground of defending it, the Court must be satisfied that there exist adequate and effective guarantees against abuse (see the Klass and Others judgment of 6 September 1978, Series A no. 28, pp. 23-24, paras. 49-50).
>
> [...]
>
> The Court attaches particular importance to the presence of parliamentarians on the National Police Board and to the supervision effected by the Chancellor of Justice and the Parliamentary Ombudsman as well as the Parliamentary Committee on Justice (see paragraph 62 above, nos. (v), (x), (xi) and (xii).
>
> [...]
>
> The Court, like the Commission, thus reaches the conclusion that the safeguards contained in the Swedish personnel control system meet the requirements of paragraph 2 of Article 8. Having regard to the wide margin of appreciation available to it, the respondent State was entitled to consider that in the present case the interests of national security prevailed over the individual interests of the applicant (see paragraph 59 above). The interference to which Mr Leander was subjected cannot therefore be said to have been disproportionate to the legitimate aim pursued.

Personal data

Article 8 of the Convention is also particularly relevant for the protection of personal data. In the Z v. Finland judgment (25 February 1997, Reports of Judgments and Decisions 1997-I, p. 347-348, paras. 95-99) the Court gave some general guidelines with regard to its assessment of cases in which the disclosure of personal data is at stake. In the case of Z v. Finland confidential medical information of the applicant was disclosed without her prior consent for the benefit of criminal proceedings concerning the husband of the applicant.

> In this connection, the Court will take into account that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general.
>
> Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community (see Recommendation No. R (89) 14 on the ethical issues of HIV infection in the health care and social settings, adopted by the Committee of Ministers of the Council

of Europe on 24 October 1989, in particular the general observations on confidentiality of medical data in paragraph 165 of the explanatory memorandum).

The domestic law must therefore afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention (see, *mutatis mutandis*, Articles 3 para. 2 (*c*), 5, 6 and 9 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, European Treaty Series No. 108, Strasbourg, 1981).

The above considerations are especially valid as regards protection of the confidentiality of information about a person's HIV infection. The disclosure of such data may dramatically affect his or her private and family life, as well as social and employment situation, by exposing him or her to opprobrium and the risk of ostracism. For this reason it may also discourage persons from seeking diagnosis or treatment and thus undermine any preventive efforts by the community to contain the pandemic (see the above-mentioned explanatory memorandum to Recommendation No. R (89) 14, paragraphs 166-68). The interests in protecting the confidentiality of such information will therefore weigh heavily in the balance in determining whether the interference was proportionate to the legitimate aim pursued. Such interference cannot be compatible with Article 8 of the Convention unless it is justified by an overriding requirement in the public interest.

In view of the highly intimate and sensitive nature of information concerning a person's HIV status, any state measures compelling communication or disclosure of such information without the consent of the patient call for the most careful scrutiny on the part of the Court, as do the safeguards designed to secure an effective protection (see, *mutatis mutandis*, the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, p. 21, para. 52; and the Johansen v. Norway judgment of 7 August 1996, Reports of Judgments and Decisions 1996-III, pp. 1003-1004, para. 64).

At the same time, the Court accepts that the interests of a patient and the community as a whole in protecting the confidentiality of medical data may be outweighed by the interest in investigation and prosecution of crime and in the publicity of court proceedings (see, *mutatis mutandis*, Article 9 of the above-mentioned 1981 Data Protection Convention), where such interests are shown to be of even greater importance.

It must be borne in mind in the context of the investigative measures in issue that it is not for the Court to substitute its views for those of the national authorities as to the relevance of evidence used in the judicial proceedings (see, for instance, the above-mentioned Johansen judgment, pp. 1006-1007, para. 73).

As to the issues regarding access by the public to personal data, the Court recognises that a margin of appreciation should be left to the competent national authorities in striking a fair balance between the interest of publicity of court proceedings, on the one hand, and the interests of a party or a third person in maintaining the confidentiality of such data, on the other hand. The scope of this margin will depend on such factors as the nature and seriousness of the interests at stake and the gravity of the interference (see, for instance, the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, p. 25, para. 58; and, *mutatis mutandis*, the Manoussakis and Others v. Greece judgment of 26 September 1996, Reports 1996-IV, para. 44).

This leads us to examine Article 8 para. 2.

Article 8 para. 2 – Derogation

Article 8 para. 2 is worded as follows:

> **2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.**

We shall deal here with the restrictive clauses found in Article 8 and in other Articles such as Articles 9, 10 and 11. Their wording is often very similar and it will not be necessary to set them out every time.

Interference "in accordance with the law"

In order to be justified, the interference must first of all be "in accordance with the law". In the *Sunday Times* v. the United Kingdom No. 1 judgment the Court explained the meaning of that expression (26 April 1979, Series A no. 30, pp. 30-31, paras. 47 and 49):

> [...] the word "law" in the expression "prescribed by law" covers not only statute but also unwritten law. Accordingly, the Court does not attach importance here to the fact that contempt of court is a creature of the common law and not of legislation. It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is party to the Convention of the protection of Article 10 para. 2 and strike at the very roots of that State's legal system.
>
> [...]
>
> In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

In the Silver and Others judgment of 25 March 1983, Series A no. 61, p. 33, para. 88, the Court recognised that there may be limits to the requirement of precision. It stated:

> A law which confers a discretion must indicate the scope of that discretion. However, the Court has already recognised the impossibility of attaining absolute certainty in the framing of laws and the risk that the search for certainty may entail excessive rigidity.

See also, for the concept of the notion of "law", the Malone judgment mentioned above under "Other situations under which Article 8 can apply: Surveillance by telephone tapping" (p. 74).

Interference following a "legitimate aim"

The next condition is that the interference must pursue one of the legitimate aims referred to in paragraph 2 (prevention of disorder, protection of morals, etc.). As a general rule that condition does not cause any serious problems, other than where a state has clearly acted in bad faith.

Interference "necessary in a democratic society"

The interference must still satisfy one final condition. This is the condition of "necessity", which is more difficult to satisfy – all the more so because the necessity must be evaluated within the context of "a democratic society". On this point, the above-mentioned Silver and others judgment (*ibid*., pp. 37-38, para. 97) provides a useful summary of the Court's case-law:

> On a number of occasions, the Court had stated its understanding of the phrase "necessary in a democratic society", the nature of its functions in the examination of issues turning on that phrase and the manner in which it will perform those functions. It suffices here to summarise certain principles:
>
> (*a*) the adjective "necessary" is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" (Handyside judgment of 7 December 1976, Series A no. 24, p. 22, para. 48);

(*b*) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention (*ibid*., p. 23, para. 49);

(*c*) the phrase "necessary in a democratic society" means that, to be compatible with the Convention, the interference must, *inter alia*, correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued" (*ibid*., pp. 22-23, paras. 48-49);

(*d*) those paragraphs of Article 8 of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted (above-mentioned Klass and Others judgment, Series A no. 28, p. 21, para. 42).

The Klass v. Germany judgment cited above is important for the interpretation of the notion "democratic society". The Court has held (6 September 1978, Series A no. 28, p. 25-26, para. 55) that:

> One of the fundamental principles of a democratic society is the rule of law, which is expressly referred to in the Preamble of the Convention (see the Golder judgment of 21 February 1975, Series A no. 18, pp. 16-17, para. 34). The rule of law implies, *inter alia*, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assessed by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.
>
> In the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 23, para. 49 the Court has stated that a "democratic society" is characterised by "pluralism, tolerance and broadmindedness".

It will be seen that everything depends on the particular circumstances. The Court will seek above all to ascertain whether the interference is proportionate to the legitimate aim relied on by the state. In so doing, the Court will pay particular attention to the principles proper to a "democratic society" (Silver judgment, para. 97 *et seq*.).

Article 9 ECHR – Freedom of thought, conscience and religion

Article 9 para. 1

Article 9 para. 1 is worded as follows:

> **1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.**

A number of interesting decisions deserve mention. They are essentially decisions of the Commission.

1. Importance and content of freedom of thought, conscience and religion

On this point, it is appropriate to cite the Kokkinakis v. Greece judgment (25 May 1993, Series A no. 260-A, p.17, para. 31), according to which:

> As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.
>
> While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions.
>
> According to Article 9, freedom to manifest one's religion is not only exercisable in community with others, "in public" and within the circle of those whose faith one shares, but can also be asserted "alone" and "in private"; furthermore, it includes in principle the right to try to convince one's neighbour, for example through "teaching", failing which, moreover, "freedom to change [one's] religion or belief", enshrined in Article 9, would be likely to remain a dead letter.

2. Meaning of the word "practice" manifesting a person's religion or beliefs

After stating the principle of freedom of thought, conscience and religion, Article 9 para. 1 points out some of the consequences – in particular, the right to manifest one's beliefs. The expression used is "freedom ... to manifest his religion or belief, in ... practice". It will be useful to examine the exact meaning of these terms.

In the Arrowsmith v. the United Kingdom case the applicant had been prosecuted for distributing "pacifist" pamphlets concerning the activities of the British army in Northern Ireland to members of the armed forces. It was declared inadmissible by the Commission on the ground that the activities at issue did not constitute a "manifestation" of beliefs in the proper sense. The Commission observed (Application No. 7805/77, DR 19, p. 19 *et seq.*, paras. 71 and 72):

> the term "practice" as employed in Article 9.1 does not cover each act which is motivated or influenced by a religion or a belief.
>
> It is true that public declarations proclaiming generally the idea of pacifism and urging the acceptance of a commitment to non-violence may be considered as a normal and recognised manifestation of pacifist belief. However, when the actions of individuals do not actually express the belief concerned they cannot be considered to be as such protected by Article 9.1, even when they are motivated or influenced by it.
>
> The leaflet here in question starts with the citation of the statements of two ex-soldiers one of whom says: "I'm not against being a soldier. I would be willing to fight to defend this country against an invader – I'd

> be willing to fight for a cause I can believe in. But what is happening in Ireland is all wrong". Although this is an individual opinion of a person who is not necessarily linked to the organisation which edited the leaflet its citation nevertheless indicates that the authors consider it recommendable. It can therefore not be found that the leaflet conveys the idea that one should under no circumstances, even not in response to the threat of or the use of force, secure one's political or other objectives by violent means. It only follows from the contents of the leaflet that its authors were opposed to British policy in Northern Ireland.

The Commission concluded that there had been no "manifestation of a belief" and that, accordingly, Article 9 had not been violated. Only Article 10, concerning freedom of expression, could be taken into account.

In connection with an advertisement where the Church of Scientology claimed with arguments of a religious nature the merits of a device for measuring the state of the soul, the Commission considered that the decision of a tribunal to exclude from that advertisement the use of certain religious terms was not contrary to Article 9 (Application No. 7805/77, DR 16, p. 72, para. 4). The Commission did not regard that advertisement as constituting the "manifestation" of a religious belief, and observed:

> The Commission is of the opinion that the concept, contained in the first paragraph of Article 9, concerning the manifestation of a belief in practice does not confer protection on statements of purported religious belief which appear as selling "arguments" in advertisements of a purely commercial nature by a religious group. In this connection the Commission would draw a distinction, however, between advertisements which are merely "informational" or "descriptive" in character and commercial advertisements offering objects for sale. Once an advertisement enters into the latter sphere, although it may concern religious objects central to a particular need, statements of religious content represent, in the Commission's view, more the manifestation of a desire to market goods for profit than the manifestation of a belief in practice, within the proper sense of that term. Consequently the Commission considers that the works used in the advertisement under scrutiny fall outside the proper scope of Article 9 (1) and that therefore there has been no interference with the applicants' right to manifest their religion or beliefs in practice under that article.

In the case of Manoussakis and Others v. Greece (26 September 1996, Reports of Judgments and Decisions 1996, pp. 1362, 1365, paras. 40, 47), the applicants were convicted for having established and operated a place of worship for religious ceremonies and meetings for followers of the Jehovah's Witnesses' denomination without first obtaining the authorisation of the Minister of Education and Religious Affairs and of the bishop. With regard to the authorisation requirement the Court observed:

> Like the applicants, the Court recognises that the States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population. Nevertheless, it recalls that Jehovah's Witnesses come within the definition of "known religion" as provided for under Greek law (see the Kokkinakis v. Greece judgment of 25 May 1993, Series A no. 260-A, p. 15, para. 23). This was moreover conceded by the Government.

However, this power of the state is not unlimited. The Court stated furthermore:

> The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.

The Court is of the opinion that in this case the conviction of the applicants was "not necessary in a democratic society". It considered *inter alia* that "the Heraklion Criminal Court sitting on appeal, in its judgment of 15 February 1990, relied expressly on the lack of the bishop's authorisation as well as the lack of an authorisation from the Minister of Education and Religious Affairs", whereas, as far as the Court was aware at the moment it adopted this judgment, the applicants did not have received an express decision of the Minister authorising the establishment of a place of worship.

3. Example of the application of Article 9 para. 1

In the X v. the Federal Republic of Germany case (Application No. 7705/76, DR 9, pp. 203 *et seq.*, para. 1) the Commission interpreted Article 9 in the light of Article 4 and decided that the sanctions taken by

a state against conscientious objectors who refused to carry out civilian service in substitution for military service did not infringe their freedom of conscience:

> Article 9 of the Convention relied on by the applicant guarantees everyone the right to freedom of thought, conscience and religion.
>
> When interpreting this provision in similar cases the Commission has taken into consideration Article 4 (3) (*b*) of the Convention, which provides that the term "forced or compulsory labour" within the meaning of that article shall not include "any service of a military character or, in the case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service".
>
> Since this text expressly recognises that conscientious objectors may be required to perform civilian service in substitution for compulsory military service it must be inferred that according to the Convention conscientious objection does not imply a right to be exempted from substitute civilian service (cf. Commission's opinion in Application No. 2299/66, Grandrath v. the Federal Republic of Germany – Report dated 12.12.1968, para. 32). It does not prevent a state from imposing sanctions on those who refuse such service (cf. *mutatis mutandis*, decision on Application No. 5591/72, v. Austria, Collection 43, p. 161).

Article 9 para. 2 – Derogation

Article 9 para. 2 is worded as follows:

> **2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.**

In the above-mentioned Kokkinakis v. Greece case the Court observed (para. 33):

> The fundamental nature of the rights guaranteed in Article 9 para. 1 is also reflected in the wording of the paragraph providing for limitations on them. Unlike the second paragraphs of Articles 8, 10 and 11, which cover all the rights mentioned in the first paragraphs of those Articles, that of Article 9 refers only to "freedom to manifest one's religion or belief". In so doing, it recognises that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.

In that case, however, the Court decided that Mr Kokkinakis's conviction for "proselytism" (Article 4 of the Greek statute) violated Article 9 in view of the failure to state the actual reasons on which the judgment convicting him was based (para. 49):

> The Court notes [...] that in their reasoning the Greek courts established the applicant's liability by merely reproducing the wording of section 4 and did not sufficiently specify in what way the accused had attempted to convince his neighbour by improper means. None of the facts they set out warrants that finding.
>
> That being so, it has not been shown that the applicant's conviction was justified in the circumstances of the case by a pressing social need. The contested measure therefore does not appear to have been proportionate to the legitimate aim pursued or, consequently, "necessary in a democratic society [...] for the protection of the rights and freedoms of others".

Article 10 ECHR – Freedom of expression

Article 10 is worded as follows:

> 1. **Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.**
> 2. **The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.**

1. The fundamental nature of freedom of expression

In the Handyside v. the United Kingdom case the Court emphasised the fundamental nature of the freedom enshrined in Article 10 (7 December 1976, Series A no. 24, p. 23, para. 49). The Court stated that:

> Freedom of expression constitutes one of the essential foundations of [a democratic society], one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

It is no doubt for that reason that the Court emphasised in the Autronic AG v. Switzerland case (22 May 1990, Series A no. 178, p. 23, para. 47) that:

> Article 10 [...] applies to "everyone", whether natural or legal persons. The Court has, moreover, already held on three occasions that it is applicable to profit-making corporate bodies (see the Sunday Times judgment of 26 April 1979, Series A no. 30, the Markt Intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989, Series A no. 165, and the Groppera Radio AG and Others judgment of 28 March 1990, Series A no. 173) [...] Indeed the Article expressly mentions in the last sentence of its first paragraph certain enterprises essentially concerned with [Article 10].

2. Content of freedom of expression

The second sentence of Article 10 para. 1 gives some indication of the content of freedom of expression. It covers both "freedom of expression" properly so-called and freedom "to receive and impart information and ideas". The decisions of the Court and the Commission have made it possible to identify the various elements of that definition.

Freedom of expression as freedom to receive information

In the Leander v. Sweden case (judgment of 26 March 1987, Series A no. 116, p. 29, paras. 74 and 75) the Court indicated what is covered by freedom to receive information, recognising it as the right to receive information which the holder of that information wishes to communicate. It is not a right of access to information which the holder wishes to keep for his or her own use. In the words of the judgment:

> The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of

> access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.
>
> There has thus been no interference with Mr Leander's freedom to receive information, as protected by Article 10.

In that regard, one point should be made: in the Gaskin v. the United Kingdom case (7 July 1989, Series A no. 160, p. 20, para. 49) the Court held that although a refusal to give access to personal information did not constitute a violation of Article 10 it might none the less amount to a violation of Article 8. In this case the applicant sought access to a file held by a City Council concerning his care as a minor by the Social Services with a view to bringing legal proceedings against the local authority. However, in the judgment the Court explicitly stated that its finding – that the access to the file falls within the ambit of Article 8 para. 1 – is reached without expressing any opinion on whether general rights of access to personal data and information may be derived from Article 8 para. 1 of the Convention (*ibid*., p. 15, para. 37).

Freedom of expression as freedom to impart information

Freedom of expression implies also the freedom to impart information. In the Müller and Others v. Switzerland judgment (24 May 1988, Series A no. 133, p. 19, para. 27) the Court pointed out that freedom of artistic expression falls within the scope of freedom to impart ideas. It observed that Article 10:

> includes freedom of artistic expression – notably within the freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds.

Advertising may also come under the heading of freedom to impart information. The Court initially avoided adopting a position on advertising. In a case where the applicant had been accused of making statements to a journalist which constituted publicity for his veterinary practice (the Barthold v. the Federal Republic of Germany judgment, 25 March 1985, Series A no. 90, p. 20, para. 42) the Court declared that the statements at issue contained "opinions" and "information" on a topic of general interest which overlapped to such an extent that there was nothing to justify dissociating the elements from the statements as a whole and that Article 10 was applicable in a general way. However, the Commission clearly stated its views in connection with an advertisement by the Church of Scientology in Sweden (application cited above under Article 9, Decisions and Reports No. 16, p. 72, para. 5) in which a number of passages of a religious nature had been suppressed by a court. On that point, the Commission observed:

> The restrictions imposed on the applicants' advertisements rather fall to be considered under Article 10. Article 10 (1) secures to everyone the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by a public authority.

More recently (in the Casado Coca v. Spain judgment of 24 February 1994, Series A no. 285, p. 16, para. 35) the Court adopted a clearer position on the application of Article 10 to advertising material. In so doing, it also gave a number of general examples of the freedom to impart ideas. The following passage should be noted:

> In its Barthold v. Germany judgment [...] the Court left open the question whether commercial advertising as such came within the scope of the guarantees under Article 10, but its later case-law provides guidance on this matter. Article 10 does not apply solely to certain types of information or ideas or forms of expression (see the Markt Intern Verlag GmbH and Klaus Beermann v. Germany judgment of 20 November 1989, Series A no. 165, p. 17, para. 26), in particular those of a political nature; it also encompasses artistic expression (see the Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133, p. 19, para. 27), information of a commercial nature (see the Markt intern Verlag GmbH [...] judgment previously cited, *ibid*.) – as the Commission rightly pointed out – and even light music and commercials transmitted by cable (see the Groppera Radio AG and Others v. Switzerland judgment of 28 March 1990, Series A no. 173, p. 22, paras. 54-55).

Freedom of expression taking the form of freedom of means of communication

It is not enough to be free to receive and impart information. Access to the necessary technical means is also important. In the above-mentioned Autronic AG case (*ibid*., p. 23, para. 47) the Court clearly stated that Article 10:

> applies not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information.

Generally, communication by press, radio, television etc. falls within the scope of Article 10. The same applies to the distribution of pamphlets (see the under Article 9 mentioned Arrowsmith report). That leads us directly to examine some cases where Article 10 has applied.

3. Examples of the application of Article 10

Freedom of expression and obscene publications

Following the publication of a book (called here a *Schoolbook* or a "little book") in the United Kingdom, the authorities had brought criminal proceedings on account of its obscene nature, which resulted in the applicant's conviction and the confiscation and subsequent destruction of the work in question (the Handyside v. the United Kingdom case, 7 December 1976, Series A no. 24). The Court, which was required to rule on the necessity for this interference in a democratic society, considered the parties' means.

As regards the applicant's claim that obscene magazines were permitted in the United Kingdom, the Court observed (para. 56):

> The treatment meted out to the *Schoolbook* and its publisher in 1971 was, according to the applicant and the minority of the Commission, all the less "necessary" in that a host of publications dedicated to hard-core pornography and devoid of intellectual or artistic merit allegedly profit by an extreme degree of tolerance in the United Kingdom. They are exposed to the gaze of passers-by and especially of young people and are said generally to enjoy complete impunity, the rare criminal prosecutions launched against them proving, it was asserted, more often than not abortive due to the great liberalism shown by juries. The same was claimed to apply to sex shops and much public entertainment.
>
> [...]
>
> In principle it is not the Court's function to compare different decisions taken, even in apparently similar circumstances, by prosecuting authorities and courts; and it must, just like the respondent Government, respect the independence of the courts. Furthermore and above all, the Court is not faced with really analogous situations: [...] the documents in the file do not show that the publications and entertainment in question were aimed, to the same extent as the *Schoolbook* (paragraph 52 above), at children and adolescents having ready access thereto.

As regards the fact that the work had been published in other member states of the Council of Europe (para. 57), the Court observed:

> The applicant and the minority of the Commission laid stress on the further point that, in addition to the original Danish edition, translations of the "Little Book" appeared and circulated freely in the majority of the member states of the Council of Europe.
>
> Here again, the national margin of appreciation and the optional nature of the "restrictions" and "penalties" referred to in Article 10 para. 2 prevent the Court from accepting the argument [...] The fact that most of [the Contracting States] decided to allow the work to be distributed does not mean that the contrary decision [in England] was a breach of Article 10.

Concerning the gravity of the offence (paras. 58-59), the Court noted:

> Finally, at the hearing on 5 June 1976, the delegate expounding the opinion of the minority of the Commission maintained that in any event the respondent state need not have taken measures as Draconian

> as the initiation of criminal proceedings leading to the conviction of Mr Handyside and to the forfeiture and subsequent destruction of the *Schoolbook*. The United Kingdom was said to have violated the principle of proportionality, inherent in the adjective "necessary", by not limiting itself either to a request to the applicant to expurgate the book or to restrictions on its sale and advertisement.

With regard to the first solution, the Court confines itself to finding that Article 10 of the Convention certainly does not oblige the Contracting States to introduce such prior censorship.

As for the second solution, that of restricting its sale, in the Court's opinion the *Schoolbook* would thereby lose the substance considered to be its *raison d'être*.

> On the strength of the data before it, the Court thus reaches the conclusion that no breach of the requirements of Article 10 has been established in the circumstances of the present case.

Note the importance of the margin of appreciation afforded to states when restrictions to freedom of speech are made on moral grounds.

Freedom of expression and political criticism

Criticism in political matters formed the subject-matter of the Castells v. Spain judgment (23 April 1992, Series A no. 236, pp. 23-24, paras. 46 to 50). In that case a Member of Parliament had criticised the Government for not taking positive action to investigate a number of attacks which in his view had been perpetrated by persons who continued to occupy positions of responsibility. He was convicted and the courts refused to allow him to prove the truth of his words. The Court declared generally – and this is the most significant aspect of the judgment – that the limits to criticism are broader when the target is the Government than when it is aimed at an individual. The Court then concluded that there had been a violation of Article 10 because the applicant was not allowed to adduce evidence:

> The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media. Nevertheless it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.
>
> The article which appeared in "*Punto y Hora de Euskalherria*" (see paragraph 7 above) must be considered as a whole. The applicant began by drawing up a long list of murders and attacks perpetrated in the Basque Country, then stressed that they had remained unpunished; he continued by alleging the involvement of various extremist organisations, which he named, and finally attributed to the Government the responsibility for the situation. In fact many of these assertions were susceptible to an attempt to establish their truth, just as Mr Castells could reasonably have tried to demonstrate his good faith.
>
> It is impossible to state what the outcome of the proceedings would have been had the Supreme Court admitted the evidence which the applicant sought to adduce; but the Court attaches decisive importance to the fact that it declared such evidence inadmissible for the offence in question (see paragraph 12 above). It considers that such an interference in the exercise of the applicant's freedom of expression was not necessary in a democratic society.

For other examples concerning political criticism, reference should be made to the Lingens v. Austria judgment of 8 December 1986, Series A no. 103.

Freedom of expression and the publication of secret information

In a later judgment the Court applied the principles which it established previously. This was in the Vereniging Weekblad *Bluf!* v. the Netherlands case (9 February 1995, Series A no. 306-A, pp. 15-16, paras. 43-46). The editorial staff of the newspaper *Bluf!* came into possession of what was already an old

report of the internal security service (BVD). They published the report but the copies of the newspaper were seized by the authorities. However, since the police had forgotten to confiscate the printing plates, new copies were produced and sold. The authorities did not intervene to prevent the copies from being sold: it was the Queen's birthday and the authorities did not want to cause any public disorder. Subsequently the public prosecutor had the copies withdrawn from circulation. The Court held that the withdrawal of the copies constituted an interference in freedom of expression, and went on to state that although that interference was in accordance with the law and pursued the legitimate aim of protecting national security, it was not necessary in a democratic society in order to achieve that purpose. In considering the case, the Court relied essentially on the criteria of the "publicity" of information. It observed:

> The withdrawal from circulation [...] must be considered in the light of the events as a whole. After the newspaper had been seized, the publishers reprinted a large number of copies and sold them in the streets of Amsterdam, which were very crowded (see paragraphs 11 and 38 above).
>
> Consequently, the information in question had already been widely distributed when the journal was withdrawn from circulation. Admittedly, the figure of 2 500 copies advanced by the applicant association was disputed by the Government. Nevertheless, the Court sees no reason to doubt that, at all events, a large number were sold and that the BVD's report was made widely known.
>
> In this latter connection, the Court points out that it has already held that it was unnecessary to prevent the disclosure of certain information seeing that it had already been made public (see the above-mentioned Weber v. Austria judgment, pp. 22-23, para. 9) or had ceased to be confidential (see the above-mentioned *The Observer* and *Guardian* v. the United Kingdom judgment, pp. 33-35, paras. 67-70, and above-mentioned *Sunday Times* v. the United Kingdom (No. 2) judgment, pp. 30-31, paras. 252-256).
>
> Admittedly, in the instant case the extent of publicity was different. However, the information in question was made accessible to a large number of people, who were able in their turn to communicate it to others. Furthermore, the events were commented on by the media. That being so, the protection of the information as a State secret was no longer justified and the withdrawal of issue No. 267 of *Bluf!* no longer appeared necessary to achieve the legitimate aim pursued. It would have been quite possible, however, to prosecute the offenders.
>
> In short, as the measure was not necessary in a democratic society, there has been a breach of Article 10.

Freedom of expression in the context of the public service

Article 10 para. 2 states that freedom of expression carries with it duties and responsibilities. This means that there are limits to freedom of expression for certain occupations, such as the posts of judges, civil servants, etc. The Court has dealt with these issues, and has recently stated that disciplinary measures imposed on a lawyer for infringing a ban on professional advertising were in accordance with Article 10 (2).

It is impossible to deal with everything in this short document, and for that reason only one particular aspect will be examined, namely the situation where persons who have made use of their freedom of expression have been dismissed from or refused a post in the civil service. In that regard, it is appropriate to cite the Glasenapp v. Germany judgment (28 August 1986, Series A no. 104, p. 26, paras. 49 and 50). In Germany it is necessary to take an oath of allegiance to the Constitution and its values in order to be admitted to the civil service and the authorities exclude probationers who belong to the extreme left or the extreme right. The Court pointed out first of all:

> While [...] the Contracting States did not want to commit themselves to the recognition in the Convention or its protocols of a right of recruitment to the civil service, it does not follow that in other respects civil servants fall outside the scope of the Convention (see, *mutatis mutandis*, the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, pp. 31-32, para. 60).

The Court then qualified its reasoning somewhat:

> The status or probationary civil servant that Mrs Glasenapp had acquired through her appointment as a secondary-school teacher accordingly did not deprive her of the protection afforded by Article 10. This provision is certainly a material one in the present case, but in order to determine whether it was infringed it must first be ascertained whether the disputed measure amounted to an interference with the exercise of freedom of expression – in the form, for example, of a "formality, condition, restriction or penalty" – or whether the measure lay within the sphere of the right of access to the civil service, a right that is not secured in the Convention.

After examining the circumstances of the case, the Court observed (para. 53) that:

> access to the civil service lies at the heart of the issue submitted to the Court. In refusing Mrs Glasenapp such access, the *Land* authority took account of her opinions and attitude merely in order to satisfy itself as to whether she possessed one of the necessary personal qualifications for the post in question.
>
> That being so, there has been no interference with the exercise of the right protected under paragraph 1 of Article 10.

In another case the Court took the opposite view (Vogt v. Germany, judgment of 26 September 1995, Series A no. 323, para. 44). In that case the applicant was not a probationer but was already a permanent civil servant. Before finding that there had been a violation of Article 10 which was not necessary in a democratic state, the Court observed that Article 10 para. 1 was indeed applicable:

> The Court considers, like the Commission, that the present case is to be distinguished from the cases of Glasenapp and Kosiek. In those cases the Court analysed the authorities' action as a refusal to grant the applicants access to the civil service on the ground that they did not possess one of the necessary qualifications. Access to the civil service had therefore been at the heart of the issue submitted to the Court, which accordingly concluded that there had been no interference with the right protected under paragraph 1 of Article 10 (see the previously cited Glasenapp judgment, p. 27, para. 53).
>
> Mrs Vogt, for her part, had been a permanent civil servant since February 1979. She was suspended in August 1986 and dismissed in 1987 (see paragraphs 16 and 20 above), as a disciplinary penalty, for allegedly having failed to comply with the duty owed by every civil servant to uphold the free democratic system within the meaning of the Basic Law. According to the authorities, she had by her activities on behalf of the DKP and by her refusal to dissociate herself from that party expressed views inimical to the above-mentioned system. It follows that there was indeed an interference with the exercise of the right protected by Article 10 of the Convention.

Freedom of expression in radio and television broadcasting, cinema and video

Radio and television broadcasting

In the Groppera v. Switzerland case the Court set forth the conditions for the application of Article 10 para. 1, third sentence, in relation to the licensing systems which the States may introduce in this sphere. The Court observed that the provisions of paragraph 2 covering freedom of expression apply also to such regulations (Groppera Radio AG and Others judgment, 28 March 1990, Series A no. 173, p. 24, para. 61):

> the purpose of the third sentence of Article 10 para. 1 of the Convention is to make it clear that states are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2, for that would lead to a result contrary to the object and purpose of Article 10 taken as a whole.

In the case of Informationsverein Lentia and others v. Austria, the Court applied these principles. In that case the applicants had been refused the right to set up an internal cable television network. The relevant Austrian statute vested in the federal authorities power to regulate broadcasting activities and no special licences had been granted to the applicants, since there was no statutory basis for such licences. The Austrian state declared that its intention was to guarantee the objectivity and impartiality of news, pluralism etc. by maintaining the existing public monopoly. The Court held

(Informationsverein Lentia and others v. Austria, 24 November 1993, Series A no. 276, pp. 16-17, paras. 38-39 and 42) that the refusal to grant a licence undoubtedly constituted an interference "in accordance with the law", but that it was not necessary in a democratic society. First of all the Court observed:

> The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive (see, for example, *mutatis mutandis*, *The Observer* and *Guardian* v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59). Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the state is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.
>
> Of all the means of ensuring that these values are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station. The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need.

After examining the Government's argument mentioned above, the Court stated:

> The Court is not persuaded by the Government's arguments. Their assertions are contradicted by the experience of several European states, of a comparable size to Austria, in which the coexistence of private and public stations, according to rules which vary from country to country and accompanied by measures preventing the development of private monopolies, shows the fears expressed to be groundless.

For other examples of case-law concerning television communications, reference should be made to the Autronic judgment cited above at the beginning of the examination of Article 10.

Cinema

As regards the cinema, the Otto-Preminger-Institut v. Austria case should be mentioned (22 September 1994, Series A no. 295-A, p. 19, para. 49). In that case a film had been seized by the state authorities because of the provocation which it constituted for Catholics. The Court found no violation of Article 10. Interestingly, it lays down principles which may be applied when a work of art causes offence to religious beliefs:

> as is borne out by the wording itself of Article 10 para. 2, whoever exercises the rights and freedoms enshrined in the first paragraph of that Article undertakes "duties and responsibilities". Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.
>
> This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any "formality", "condition", "restriction" or "penalty" imposed be proportionate to the legitimate aim pursued (see the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 23, para. 49).

The Court concluded:

> The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time. In all the circumstances of the present case, the Court does not consider that the Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect (*ibid*., p. 21, para. 56).

Video

In the case of Wingrove v. the United Kingdom (25 November 1996, Reports of Judgments and Decisions 1996-V, pp. 1957-1958, 1959-1960, paras. 58, 63) the applicant had directed and made a video work entitled *Visions of Ecstasy*. The British Board of Film Classification refused to grant a distribution certificate in respect for this video work because it was considered to be blasphemous. In the judgment the Court reiterates the applicable principles with regard to the margin of appreciation of the Contracting States in political speech cases and in so-called "artistic expression" cases in relation to "morals":

> Whereas there is little scope under Article 10 para. 2 of the Convention for restrictions on political speech or on debate of questions of public interest (see, *mutatis mutandis*, among many other authorities, the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, p. 26, para. 42; the Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 23, para. 43 and the Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239, p. 27, para. 63), a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the "necessity" of a "restriction" intended to protect from such material those whose deepest feelings and convictions would be seriously offended (see, *mutatis mutandis*, the Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133, p. 22, para. 35).
>
> This does not of course exclude final European supervision. Such supervision is all the more necessary given the breadth and open-endedness of the notion of blasphemy and the risks of arbitrary or excessive interferences with freedom of expression under the guise of action taken against allegedly blasphemous material. In this regard the scope of the offence of blasphemy and the safeguards inherent in the legislation are especially important. Moreover the fact that the present case involves prior restraint calls for special scrutiny by the Court (see, *mutatis mutandis*, *The Observer* and *Guardian* v. the United Kingdom judgment of 26 November 1991, Series A no. 216, p. 30, para. 60).

The applicant and the Delegate of Commission had submitted "that a short experimental video work would reach a smaller audience than a major feature film, such as the one at issue in the Otto-Preminger-Institut case. [...] Furthermore, this risk could have been reduced further by restricting the distribution of the film to licensed sex shops". In this case the British Board of Film Classification refused to grant a classification at all. As result of this refusal the applicant was not allowed to distribute the video work. With regard to these submissions the Court responded as follows:

> The Court notes, however, that it is in the nature of video works that once they become available on the market they can, in practice, be copied, lent, rented, sold and viewed in different homes, thereby easily escaping any form of control by the authorities.
>
> In these circumstances, it was not unreasonable for the national authorities, bearing in mind the development of the video industry in the United Kingdom (see paragraph 22 above), to consider that the film could have reached a public to whom it would have caused offence. The use of a box including a warning as to the film's content (see paragraph 62 above) would have had only limited efficiency given the varied forms of transmission of video works mentioned above. In any event, here too the national authorities are in a better position than the European Court to make an assessment as to the likely impact of such a video, taking into account the difficulties in protecting the public.

Freedom of expression and freedom of the press

Seizure and confiscation of newspapers

The Court summarised its case-law in relation to the press in *The Observer* and *Guardian* v. the United Kingdom case (26 November 1991, Series A no. 216, pp. 29-30, paras. 59-60), where the fundamental principles relating to freedom of expression applied to the press are set out:

> (*a*) Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.
>
> (*b*) These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".
>
> (*c*) The adjective "necessary", within the meaning of Article 10 para. 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.
>
> (*d*) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent state exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".
>
> [...] Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such. This is evidenced not only by the words "conditions", "restrictions", "preventing" and "prevention" which appear in that provision, but also by the Court's *Sunday Times* judgment of 26 April 1979 and its Markt Intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989 (Series A no. 165). This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.

The *Sunday Times* v. the United Kingdom No. 1 (judgment of 26 April 1979, Series A no. 30) is one of the leading cases on which the Court based its summary in *The Observer* and *Guardian* case. In that case the applicants wished to publish an article about the way in which a company had tested a medicine (Thalidomide) before putting it on the market. The medicine had produced harmful effects and the victims had instituted legal proceedings. The pharmaceutical company succeeded in obtaining an injunction against the publication of the article in question on the ground that it constituted a contempt of court. Concerning the injunction, the Court said (para. 65):

> There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before

> the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.

The Court pointed out that the victims' families had a right to information, that in fact they (para. 66):

> had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared absolutely certain that its diffusion would have presented a threat to the "authority of the judiciary".

Proceedings against journalists

The Court is generally extremely vigilant in its supervision of Article 10 in relation to the press. It held that where a television journalist was fined for being involved in spreading racist statements made by the so-called "Greenjackets" there was a breach of Article 10. The Court observed (Jersild v. Denmark case, 23 September 1994, Series A no. 298, pp. 23, 25-26, paras. 31 and 35):

> A significant feature of the present case is that the applicant did not make the objectionable statements himself but assisted in their dissemination in his capacity of television journalist responsible for a news programme of Danmarks Radio (see paragraphs 9 to 11 above). In assessing whether his conviction and sentence were "necessary" the Court will therefore have regard to the principles established in its case law relating to the role of the press (as summarised in for instance *The Observer* and *Guardian* v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59).
>
> [...]
>
> News reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog" (see for instance, the above-mentioned *Observer* and *Guardian* judgment, pp. 29-30, para. 59). The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. In this regard the Court does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted.
>
> There can be no doubt that the remarks in respect of which the Greenjackets were convicted (see paragraph 14 above) were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10 (see, for example, the Commission's admissibility decisions in Applications No. 8948/78 and 8406/78, Glimmerveen and Hagenbeek v. the Netherlands, DR 18, p. 187, and No. 9235/81, Künen v. the Federal Republic of Germany, DR 29, p. 194). However, even having regard to the manner in which the applicant prepared the Greenjackets item (see paragraph 32 above), it has not been shown that, considered as a whole, the feature was such as to justify also his conviction of, and punishment for, a criminal offence under the Penal Code.

Reference should also be made to the Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239, in which case the conviction and sentence of a writer for defamation as a result of the publishing of two articles on police brutality in the daily newspaper was a violation of Article 10.

In the Prager and Oberschlick v. Austria case (26 April 1995, Series A no. 313), on the other hand, the conviction of a journalist and a publisher for defamation of a judge was not regarded as a violation of Article 10. The Court observed:

> that the allegations levelled against the judge "were extremely serious" (paragraph 36);
>
> that "the excessive breadth of the accusations [...], in the absence of a sufficient factual basis, appeared unnecessarily prejudicial" (paragraph 37); and
>
> that the applicant "could [not] invoke his good faith or compliance with the ethics of journalism. The research that he had undertaken does not appear adequate to substantiate such serious allegations" (paragraph 37).

Having regard to these factors and to "the special role of the judiciary in society", the Court found that the imposition of a fine and the confiscation of the remaining copies of the offending periodical did not constitute a violation of Article 10 (para. 38).

For another example concerning the defamation of – lay – judges, reference should be made to the Barfod v. Denmark judgment of 22 February 1989, Series A no. 149.

Protection of journalistic sources

Article 10 of the Convention protects journalists in principle against the compulsion or an order to reveal his sources. In the Goodwin v. the United Kingdom judgment (27 March 1996, Reports of Judgments and Decisions 1996-II, pp. 500, 502, paras. 39, 45) the applicant was telephoned by a person who supplied him with information about the financial problems of Tetra Ltd company. This information derived from a confidential corporate plan which appeared to have been stolen. The applicant maintained that he did not know that the information derived from a stolen or confidential document. Tetra asked for an injunction restraining the publishers from publishing any information derived from the corporate plan. The High Court granted this application. After the granting of the injunction the High Court ordered the applicant to disclose the source's identity. With regard to the disclose order the Court considers:

> Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms (see, amongst others, the Resolution on Journalistic Freedom and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and Resolution on the Confidentiality of Journalists' Sources by the European Parliament, 18 January 1994, *Official Journal of the European Communities* No. C 44/34). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result of the public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.

In this case the Court concluded that:

> On the facts of the present case, the Court cannot find that Tetra's interests in eliminating, by proceedings against the source, the residual threat of damage through dissemination of the confidential information otherwise than by the press, in obtaining compensation and in unmasking a disloyal employee or collaborator were, even if considered cumulatively, sufficient to outweigh the vital public interest in the protection of the applicant journalist's source. The Court does not therefore consider that the further purposes served by the disclosure order, when measured against the standards imposed by the Convention, amount to an overriding requirement in the public interest.
>
> [...]
>
> Accordingly, the Court concludes that both the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so gave rise to a violation of his right to freedom of expression under Article 10.

Article 11 ECHR – Freedom of assembly and association

Article 11 para. 1

Article 11 para. 1 is worded as follows:

> **1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.**

It is clear that the same article deals with both freedom of assembly and freedom of association.

1. Freedom of assembly

In this context the following decisions of the Commission and the Court shed light on the fundamental character of this right, to its nature and to certain limitations that are applicable.

The fundamental nature of freedom of assembly

In the *Rassemblement jurassien* v. Switzerland case (Application No. 8191/78, Decision of 10 October 1979, DR 17, p. 119, para. 3) the Commission stated:

> The Commission wishes to state at the outset that the right of peaceful assembly stated in this article is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society (Handyside case, judgment of 7 December 1976, Series A, para. 49). As such this right covers both private meetings and meetings in public thoroughfares.

Content of freedom of assembly

In its decision of 16 July 1980 in the Christians Against Racism and Fascism v. the United Kingdom case (Application No. 8840/78; DR 21, p. 148, para. 4) the Commission stated that:

> the freedom of peaceful assembly covers not only static meetings, but also public processions. It is moreover a freedom capable of being exercised not only by the individual participants of such demonstration, but also by those organising it, including a corporate body such as the applicant association.

On the other hand, the desire of prisoners to share the same cell is not part of freedom of assembly (McFeeley v. the United Kingdom case, Application No. 8317/78, Decision of 15 May 1980, DR 20, p. 98, paragraphs 114 and 115). The Commission stated:

> As the language of Article 11 suggests, the concept of freedom of association, of which the right to form and join trade unions is a special aspect, is concerned with the right to form or be affiliated with a group or organisation pursuing particular aims. It does not concern the right of prisoners to share the company of other prisoners or to "associate" with other prisoners in this sense.
>
> Consequently the Commission considers that this complaint must be rejected under Article 27.2 as incompatible *ratione materiae* with the provisions of the Convention.

Restrictions and limitations by the state on freedom of assembly

In the above-mentioned *Rassemblement jurassien* v. Switzerland case (*ibid*., p. 119, para. 3 *in fine*) the Commission ruled on the lawfulness of a system which subjected demonstrations to prior authorisation:

> Where [meetings in public thoroughfares] are concerned, their subjection to an authorisation procedure does not normally encroach upon the essence of the right. Such a procedure is in keeping with the requirements of Article 11.1, if only in order that the authorities may be in a position to ensure the

> peaceful nature of a meeting, and accordingly does not as such constitute interference with the exercise of the right.

The Christians Against Racism and Fascism v. the United Kingdom case (the above-mentioned case, p. 150, para. 5) shows the circumstances in which a general prohibition on demonstrations for a specific period is lawful under Article 11. The Commission stated:

> A general ban on demonstrations can only be justified if there is a real danger of their resulting in disorder which cannot be prevented by other less stringent measures. In this connection, the authority must also take into account the effect of a ban on processions which do not by themselves constitute a danger for the public order. Only if the disadvantage of such processions being caught by the ban is clearly outweighed by the security considerations justifying the issue of the ban, and if there is no possibility of avoiding such undesirable side effects of the ban by a narrow circumscription of its scope in terms of territorial application and duration, can the ban be regarded as being necessary within the meaning of Article 11 (2) of the Convention.

The principle of freedom of assembly imposes positive obligations on the state. Although the state can place restrictions on freedom of assembly, it must also allow its effective exercise. This is especially the case when demonstrators come into conflict with their opponents In the Plattform "Ärzte für das Leben" v. Austria case (21 June 1988, Series A no. 139, p. 12, paras. 32 and 34) the Court observed that:

> A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.
>
> Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the state not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be (see, *mutatis mutandis*, the X and Y v. the Netherlands judgment of 26 March 1985, Series A no. 91, p. 11, para. 23).

The Court went on to point out that:

> While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used (see, *mutatis mutandis*, the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, pp. 33-34, para. 67, and the Rees judgment of 17 October 1986, Series A no. 106, pp. 14-15, paras. 35-37). In this area the obligation they enter into under Article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved.

In that case the Court considered that the Austrian state had taken "reasonable and appropriate measures".

2. Freedom of association

As well as the freedom of assembly, Article 11 deals also with freedom of association.

In the National Union of Belgian Police case (27 October 1975, Series A no. 19, p. 17, para. 38) the Court observed that:

> Article 11 para. 1 presents trade union freedom as one form or a special aspect of freedom of association.

In the Sigurður A. Sigurjónsson v. Iceland case (30 June 1993, Series A no. 264, p. 14, para. 32) the Court found that the organisation at issue on the nature of which the Court was to rule was an

association and that there was no need, for the purposes of Article 11, to ascertain whether it was also a trade union.

> It is not necessary to decide whether Frami can also be regarded as a trade union within the meaning of Article 11, since the right to form and join trade unions in that provision is an aspect of the wider right to freedom of association, rather than a separate right (see, amongst other authorities, the Schmidt and Dahlström v. Sweden judgment of 6 February 1976, Series A no. 21, p. 15, para. 34).

This section will therefore include judgments on freedom of association and trade union freedom whose scope covers both aspects. see the following section for questions relating solely to trade union freedom.

Notion of association

It is necessary to begin by defining "association". In the Le Compte, Van Leuven and de Meyere v. Belgium case (23 June 1981, Series A no. 43, p. 26-27, paras. 64 and 65) the Court employed three criteria: the origin, the objective and the means of the organisation in question. It that case the organisation was the *Ordre des médecins*:

> The Court notes first that the Belgian *Ordre des médecins* is a public-law institution. It was founded not by individuals but by the legislature; it remains integrated within the structures of the state and judges are appointed to most of its organs by the Crown. It pursues an aim which is in the general interest, namely the protection of health, by exercising under the relevant legislation a form of public control over the practice of medicine. Within the context of this latter function, the *Ordre* is required in particular to keep the register of medical practitioners. For the performance of the tasks conferred on it by the Belgian state, it is legally invested with administrative as well as rule-making and disciplinary prerogatives out of the orbit of the ordinary law (*prérogatives exorbitantes du droit commun*) and, in this capacity, employs processes of a public authority (see paragraphs 20-34 above).
>
> Having regard to these various factors taken together, the *Ordre* cannot be considered as an association within the meaning of Article 11.

It is all a question of degree, however. In a recent case (the above-mentioned Sigurður A. Sigurjónsson v. Iceland case, 30 June 1993, pp. 13-14, paras. 30, 31) the Government contended that Frami – an association of taxi-cab drivers – was not a "trade union", nor even an association within the meaning of Article 11, but a professional organisation of a public-law character. For this point of view the Government invoked mainly the following arguments: Frami performed certain functions which were provided by law or had evolved through practice and served the public interest no less than the interests of its members and was not an employees' organisation representing its members in conflict with their employer or engaging in collective bargaining. The Court observed in this respect:

> that the above-mentioned elements are not sufficient for Frami to be regarded as a public-law association outside the ambit of Article 11. Admittedly, Frami performed certain functions which were to some extent provided for in the applicable legislation and which served not only its members but also the public at large (see paragraphs 22-23 above). However, the role of supervision of the implementation of the relevant rules was entrusted primarily to another institution, namely the Committee, which in addition had the power to issue licences and to decide on their suspension and revocation (see paragraphs 20 and 25 above). Frami was established under private law and enjoyed full autonomy in determining its own aims, organisation and procedure. According to its Articles, admittedly and currently under revision, the purpose of Frami was to protect the professional interests of its members and promote solidarity among professional taxicab drivers; to determine, negotiate and present demands relating to the working hours, wages and rates of its members; to seek to maintain limitations on the number of taxicabs and to represent its members before the public authorities (see paragraph 21 above). Frami was therefore predominantly a private-law organisation and must thus be considered an "association" for the purposes of Article 11.

Content of freedom of association

There are two aspects to freedom of association: the first, negative one, is the right *not* to associate; the second, positive, is the right to associate or to belong to an association.

Freedom not to associate

For the freedom not to associate, the main question to be answered is whether or not the organisation at issue is an association within the meaning of the Convention.

Where it is not an association within the meaning of the Convention, the law may provide for compulsory membership. However, this is subject to the condition that this does not preclude freedom to establish associations which co-exist with such an organisation. Thus in the above-mentioned Le Compte, Van Leuven and de Meyere v. Belgium judgment (p. 27, para. 65) the Court, after observing that the Belgian *Ordre des médecins* was not an association and that compulsory membership did not violate Article 11 para. 1, which referred solely to associations, observed:

> if there is not to be a violation, the setting up of the *Ordre* by the Belgian state must not prevent practitioners from forming together or joining professional associations. Totalitarian regimes have resorted – and resort – to the compulsory regimentation of the professions by means of closed and exclusive organisations taking the place of the professional associations and the traditional trade unions. The authors of the Convention intended to prevent such abuses (see the Collected Edition of the *Travaux préparatoires*, Vol. II, pp. 116-118).
>
> The Court notes that in Belgium there are several associations formed to protect the professional interests of medical practitioners and which they are completely free to join or not (see paragraph 22 above). In these circumstances, the existence of the *Ordre* and its attendant consequence – that is to say, the obligation on practitioners to be entered on the register of the *Ordre* and to be subject to the authority of its organs – clearly have neither the object nor the effect of limiting, even less suppressing, the right guaranteed by Article 11 (1).

Where the organisation in question is an association, the question of compulsory membership is more delicate. The Court initially adopted a prudent approach. In the Young, James and Webster v. the United Kingdom case (13 August 1981, Series A no. 44, pp. 21-23, paras. 52, 53 and 55) the Court was required to rule on the "closed shop" system in the United Kingdom. It observed that in principle Article 11 could not accept a system of coercion in connection with membership of an association. Although the Court found in that case that compulsory membership of a trade union was contrary to Article 11, the refusal to join had had a very serious consequence for the applicants, who had in fact been dismissed. The Court observed:

> Assuming for the sake of argument that [...] a general rule such as that in Article 20 para. 2 of the Universal Declaration of Human Rights was deliberately omitted from, and so cannot be regarded as itself enshrined in, the Convention, it does not follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11 and that each and every compulsion to join a particular trade union is compatible with the intention of that provision. To construe Article 11 as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee (see, *mutatis mutandis*, the judgment of 23 July 1968 on the merits of the "Belgian Linguistics" case, Series A no. 6, p. 32, para. 5, the Golder judgment of 21 February 1975, Series A no. 18, p. 19, para. 38, and the Winterwerp judgment of 23 October 1979, Series A no. 33, p. 24, para. 60).
>
> The Court emphasises once again that, in proceedings originating in an individual application, it has, without losing sight of the general context, to confine its attention as far as possible to the issues raised by the concrete case before it (see, *inter alia*, the Guzzardi judgment of 6 November 1980, Series A no. 39, pp. 31-32, para. 88). Accordingly, in the present case, it is not called upon to review the closed shop system as such in relation to the Convention or to express an opinion on every consequence or form of compulsion which it may engender; it will limit its examination to the effects of that system on the applicants.
>
> [...]
>
> Assuming that Article 11 does not guarantee the negative aspect of that freedom on the same footing as the positive aspect, compulsion to join a particular trade union may not always be contrary to the Convention.

> However, a threat of dismissal involving loss of livelihood is a most serious form of compulsion and, in the present instance, it was directed against persons engaged by British Rail before the introduction of any obligation to join a particular trade union.
>
> In the Court's opinion, such a form of compulsion, in the circumstances of the case, strikes at the very substance of the freedom guaranteed by Article 11.

The Court adopted a distinctly firmer approach in the Sigurður A. Sigurjónsson v. Iceland judgment (judgment cited above, p. 16, para. 35). Before stating that there had been a violation, it observed:

> [...] it should be recalled that the Convention is a living instrument which must be interpreted in the light of present-day living conditions (see, amongst other authorities, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 40, para. 102). Accordingly, Article 11 must be viewed as encompassing a negative right of association. It is not necessary for the Court to determine in this instance whether this right is to be considered on an equal footing with the positive right.

The right to join

Alongside the issue of compulsory membership, the Commission has had to define another aspect of the content of freedom of association: the freedom to belong to an association. In the Cheall v. the United Kingdom case (Application No. 10550/83, Decision of 13 May 1985, DR 42, p. 185) the Commission ruled on the internal regulations and decisions of associations and a person's freedom to be a member of an association or trade union.

> In the Commission's view the right to form trade unions involves, for example, the right of trade unions to draw up their own rules, to administer their own affairs and to establish and join trade union federations. Such trade union rights are explicitly recognised in Articles 3 and 5 of ILO Convention No. 87 which must be taken into account in the present context [...]
>
> Accordingly trade union decisions in these domains must not be subject to restrictions and control by the state except on the basis of Article 11 para. 2. As a corollary, such decisions must be regarded as private activity for which, in principle, the state cannot be responsible under the Convention.
>
> The right to join a union "for the protection of his interests" cannot be interpreted as conferring a general right to join the union of one's choice irrespective of the rules of the union. In the exercise of their rights under Article 11 para. 1, unions must remain free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union. The protection afforded by the provision is primarily against interference by the state.

3. Questions peculiar to trade unions

The Court has expressed its views on a number of particular aspects of trade union freedom.

What is not covered by trade union freedom

In the National Union of Belgian Police case the Court observed (p. 17, para. 38) that:

> while Article 11 para. 1 presents trade union freedom as one form or a special aspect of freedom of association, the article does not guarantee any particular treatment of trade unions, or their members by the state,

Then (same judgment, p. 18, para. 38) the Court went on to state that Article 11 did not lay down:

> the right to be consulted by [the state]. Not only is this latter right not mentioned in Article 11 para. 1, but neither can it be said that all the Contracting States in general incorporate it in their national law or practice, or that it is indispensable for the effective enjoyment of trade union freedom. It is thus not an element necessarily inherent in a right guaranteed by the Convention.

From the same aspect (Schmidt and Dahlström v. Sweden case, 6 February 1975, Series A no. 21, pp. 15-16, paras. 34 and 36) the Court established two further points:

> Article 11 does not secure [for] trade union members [...] the right to retroactivity of benefits, for instance salary increases, resulting from a new collective agreement. Such a right, which is enunciated neither in Article 11 para. 1 nor even in the Social Charter of 18 October 1961, is not indispensable for the effective enjoyment of trade union freedom and in no way constitutes an element necessarily inherent in a right guaranteed by the Convention.
>
> [...]
>
> [The right to strike], which is not expressly enshrined in Article 11, may be subject under national law to regulation of a kind that limits its exercise in certain instances.

What is meant by trade union freedom

The Court does not deprive trade union freedom of all its content; in the National Union of Belgian Police case (judgment cited above, p. 18, para. 39) the Court observed, in relation to the right to be consulted:

> the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. In the opinion of the Court, it follows that the members of a trade union have a right, in order to protect their interests, that the trade union should be heard. Article 11 para. 1 certainly leaves each state a free choice of the means to be used towards this end. While consultation is one of these means, there are others. What the Convention requires is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests.

A distinction is made between the right to be heard and its possible implementation by means of consultation It appears that the state may choose whatever means it considers most appropriate.

Thus trade union freedom was seen in terms of union organisation. As far as trade union freedom from the aspect of individuals is concerned, reference should be made to the above-mentioned Cheall v. the United Kingdom case, where the Commission observed (DR 42, p. 186):

> for the right to join a union to be effective the state must protect the individual against any abuse of a dominant position by trade unions (see Eur. Court H.R., Young, James and Webster judgment of 13 August 1981, Series A no. 44, p. 25, para. 63). Such abuse might occur, for example, where exclusion or expulsion was not in accordance with union rules or where the rules were wholly unreasonable or arbitrary or where the consequences of exclusion or expulsion resulted in exceptional hardship such as job loss because of a closed shop.

Article 11 para. 2 – Derogatory clause

Article 11 para. 2 is worded as follows:

> **2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.**

Article 11 para. 2 provides for two types of restriction: restrictions that apply to everybody, and restrictions that apply especially to administrations.

1. Article 11 para. 2, first sentence – Restrictions to be applied to everybody

Concerning that first category of restrictive clauses, the Ezelin v. France judgment of 26 April 1991 should be mentioned (Series A no. 202, para. 53). In that case a lawyer had been reprimanded for taking part in a demonstration against the adoption of the "security and liberty" act. The Court observed:

> Admittedly, the penalty imposed on Mr Ezelin was at the lower end of the scale of disciplinary penalties given in Article 107 of the Decree of 9 June 1972 (see paragraph 25 above); it had mainly moral force, since it did not entail any ban, even a temporary one, on practising the profession or on sitting as a member of the Bar Council. The Court considers, however, that the freedom to take part in a peaceful assembly – in this instance a demonstration that had not been prohibited – is of such importance that it cannot be restricted in any way, even for an *avocat*, so long as the person concerned does not himself commit any reprehensible act on such an occasion.
>
> In short, the sanction complained of, however minimal, does not appear to have been "necessary in a democratic society". It accordingly contravened Article 11.

2. Article 11 para. 2, second sentence – Restrictions on the administration

On this point, the decision of the Commission in the Council of Civil Service Unions v. the United Kingdom case should be mentioned (Application No. 11603/85, Decision of 20 January 1987; DR 50, p. 239, para. 1 and p. 241, para 1 *in fine*). In this case the applicants complain that the respondent Government have removed the right of individual employees at GCHQ (Government Communications Headquarters, responsible for monitoring military and official communications) to belong to a trade union. The Commission made a number of points:

> The Commission has examined whether the staff serving at GCHQ fall under the term "members [...] of the administration of the state". To a certain extent, the meaning and scope of these terms is uncertain and the Commission will not attempt to define them in detail. Nevertheless, the Commission notes that the terms are mentioned in the same sentence in Article 11, para. 2, together with "members of the armed forces [and] of the police". In the present case, the Commission is confronted with a special institution, namely GCHQ, whose purpose resembles to a large extent that of the armed forces and the police insofar as GCHQ staff directly or indirectly, by ensuring the security of the respondent Government's military and official communications, fulfil vital functions in protecting national security.
>
> The Commission is therefore satisfied that the staff serving at GCHQ can be considered as "members [...] of the administration of the state" within the meaning of the second sentence of Article 11 para. 2 of the Convention. It must therefore examine whether the further conditions of the second sentence of Article 11 para. 2 have been met, in particular whether the restrictions at issue were "lawful" within the meaning of that provision.
>
> [...]
>
> The Commission has examined first the applicants' submission that the term "restrictions" in the second sentence of Article 11 para. 2 cannot imply complete suppression of the exercise of the right in Article 11. However, the Commission recalls that the same term is also employed in the first sentence of Article 11 para. 2. This provision has been interpreted by the Commission as also covering a complete prohibition of the exercise of the rights in Article 11 (see e.g. No. 8191/78, Rassemblement jurassien and Unité jurassienne v. Switzerland, Dec. 10.10.79, DR 17 p. 93). Accordingly, the term "restrictions" in the second sentence of Article 11 para. 2 is sufficiently broad also to cover the measures at issue.
>
> Second, the Commission notes the applicants' submissions that the term "lawful" in the second sentence of Article 11 para. 2 includes the principle of proportionality. In this respect, the Commission finds that, even if the term "lawful" ("*légitime*") should require something more than a basis in national law, in particular a prohibition of arbitrariness, there can be no doubt that this condition was in any event also observed in the present case.

The Commission recalls its case-law according to which states must be given a wide discretion when ensuring the protection of their national security (see Leander v. Sweden, Comm. Report 17.5.85, para. 68, Series A no. 116, p. 43).

Article 12 ECHR – The right to marry

Article 12 is worded as follows:

> **Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.**

1. The persons concerned by the right to marry

In the Rees v. the United Kingdom case (17 October 1986, Series A no. 106, p. 19, paras. 49-51) the Court considered that Article 12 could apply only between persons of the opposite sexes. In that case there had been no violation of Article 12 where marriage with a transsexual was refused. It will be observed that the Court based its decision on the concept of biological sex rather than that of apparent sex:

> In the Court's opinion, the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family.
>
> Furthermore, Article 12 lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired. However, the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind.
>
> There is accordingly no violation in the instant case of Article 12 of the Convention.

See for another example the Cossey v. the United Kingdom judgment of 27 September 1990, Series A no. 184, pp. 17-18, paras. 43-46.

2. The force of the right to marry

In the F. v. Switzerland case (18 December 1987, Series A no. 128, p. 16, paras. 32 and 33) the Court considered that a temporary prohibition on remarrying imposed on a person following his third divorce constituted a violation of Article 12. The Court recalled its decision in the Rees case and observed:

> Article 12 secures the fundamental right of a man and a woman to marry and to found a family. The exercise of this right gives rise to personal, social and legal consequences. It is "subject to the national laws of the Contracting States", but "the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired" (see the Rees judgment of 17 October 1986, Series A no. 106, p. 19, para. 50).
>
> In all the Council of Europe's member States, these "limitations" appear as conditions and are embodied in procedural or substantive rules. The former relate mainly to publicity and the solemnisation of marriage, while the latter relate primarily to capacity, consent and certain impediments.
>
> The prohibition imposed on F was applied under rules governing the exercise of the right to marry, as Article 12 does not distinguish between marriage and remarriage.

After considering the Government's arguments concerning the protection of the stability of marriage, the interest of the children etc. the Court came to the conclusion (p. 19, para. 40) that:

> The disputed measure, which affected the very essence of the right to marry, was disproportionate to the legitimate aim pursued. There was, therefore, a violation of Article 12.

3. The right to marry and the right to divorce

In the Johnston and Others v. Ireland case (18 December 1986, Series A no. 112, p. 24, paras. 52 and 54) the Court took the view that Article 12 did not contain a right to divorce. The Court stated that:

> the ordinary meaning of the works "right to marry" is clear, in the sense that they cover the formation of marital relationships but not their dissolution. Furthermore, these words are found in a context that includes and express reference to "national laws"; even if, as the applicants would have it, the prohibition on divorce is to be seen as a restriction on capacity to marry, the Court does not consider that, in a society adhering to the principle of monogamy, such a restriction can be regarded as injuring the substance of the right guaranteed by Article 12.
>
> [...]
>
> the applicants cannot derive a right to divorce from Article 12.

Article 13 ECHR – The right to an effective remedy

Article 13 is worded 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.**

1. General principles flowing from Article 13

In its judgments the Court has identified a number of general principles flowing from Article 13. The Leander v. Sweden judgment of 26 March 1987, Series A no. 116, pp. 29-30, para. 77) provides a concise summary of these principles. The Court states that:

> For the interpretation of Article 13, the following general principles are of relevance:
>
> (*a*) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (see, inter alia, the above-mentioned Silver and Others judgment, Series A no. 61, p. 42, para. 113);
>
> (*b*) the authority referred to in Article 13 need not be a judicial authority but, if it is not, the powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective (ibid.);
>
> (*c*) although no single remedy may itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (ibid.);
>
> (*d*) Article 13 does not guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or equivalent domestic norms (see the James and Others judgment of 21 February 1986, Series A no. 98, p. 47, para. 85).

In the same judgment the Court referred to the James and Others judgment, where it had already held that there is no "obligation to incorporate the Convention into domestic law". Here one can see the Court taking into account different states' individualities when it comes to implementing international law (to be noted especially in the case of the United Kingdom). One can also detect a desire to avoid offending the sensibilities of states desirous to retain their sovereignty in legislative matters. It is enough that an appeal system exists to decide on the applicant's complaint, it does not require that there be a remedy allowing the laws of a Contracting State to be challenged before a national authority on the grounds of being contrary to the Convention.

In this context we should mention the Boyle and Rice v. the United Kingdom judgment (27 April 1988, Series A no. 131, pp. 23-24, paras. 52 and 55) where the Court recalls another fundamental principle:

> Notwithstanding the terms of Article 13 read literally, the existence of an actual breach of another provision of the Convention (a "substantive" provision) is not a prerequisite for the application of the Article (see the Klass and Others judgment of 6 September 1978, Series A no. 28, p. 29, para. 64). Article 13 guarantees the availability of a remedy at a national level to enforce – and hence to allege non-compliance with – the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order (see the Lithgow and Others judgment of 8 July 1986, Series A no. 102, p. 74, para. 205, and the authorities cited there).
>
> However, Article 13 cannot reasonably be interpreted so as to require a remedy in domestic law in respect of any supposed grievance under the Convention that an individual may have, no matter how unmeritorious his complaint may be: the grievance must be an arguable one in terms of the Convention (see, as the most recent authority, the Leander judgment of 26 March 1987, Series A no. 116, p. 29, para. 77(*a*)).

[...]

> The Court does not think that it should give an abstract definition of the notion of arguability. Rather it must be determined, in the light of the particular facts and the nature of the legal issue or issues raised, whether each individual claim of violation forming the basis of a complaint under Article 13 was arguable and, if so, whether the requirements of Article 13 were met in relation thereto.

In the Powell and Rayner v. the United Kingdom judgment of 12 February 1990, Series A no. 172, pp. 14-15, para. 33, the Court gave an elucidation about the relation between the notions "manifestly ill-founded" for the purposes of Article 27 para. 2 and "arguable" for the purposes of Article 13.

> As the Court stated in the Boyle and Rice judgment, "on the ordinary meaning of the words, it is difficult to conceive how a claim that is 'manifestly ill-founded' can nevertheless be 'arguable' and *vice versa*" (*loc. cit.*, p. 24, para. 54). Furthermore, Article 13 and Article 27 are concerned within their respective spheres, with the availability of remedies for the enforcement of the same Convention rights and freedoms. The coherence of this dual system of enforcement is at risk of being undermined if Article 13 is interpreted as requiring national law to make available an "effective remedy" for a grievance classified under Article 27 para. 2 as being so weak as not to warrant examination on its merits at international level. Whatever treshold the Commission has set in its case-law for declaring claims "manifestly ill-founded" under Article 27 para. 2, in principle it should set the same threshold in regard to the parallel notion of "arguability" under Article 13.

2. Limits to the application of Article 13

It should be noted that the Court does not regard it as appropriate to examine a complaint based on Article 13 where it has already considered the question of a remedy under another Article. In the Foti and Others v. Italy case (10 December 1982, Series A no. 56, p. 24, para. 78) the Court observed:

> Like the Commission (see paragraph 151 of the report), the Court considers it superfluous to decide on the application of Article 13 in the instant case in view of the fact that the parties have not pursued the matter and in view of its own conclusion that there has been a breach of Article 6 para. 1.

See for another example the Hentrich v. France judgment of 22 September 1994 Series A no. 296-A, p. 24, para. 65:

> In view of its decision in respect of Article 6 para. 1, the Court considers it unnecessary to look at the case under Article 13 of the Convention; this is because the requirements of that provision are less strict than, and are here absorbed by, those of Article 6 para. 1 (see, among other authorities, the Pudas v. Sweden judgment of 27 October 1987, Series A no. 125-A, p. 17, para. 43).

Similarly, in the X and Y v. the Netherlands judgment (26 March 1985, Series A no. 91, p. 15, para. 36) the Court stated that:

> The Court has already considered, in the context of Article 8, whether an adequate means of obtaining a remedy was available to Miss Y. Its finding that there was no such means was one of the factors which led it to conclude that Article 8 had been violated.
>
> This being so, the Court does not have to examine the same issue under Article 13.

Article 14 ECHR – Prohibition of discrimination

Article 14 is worded as follows:

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

As it reads, Article 14 does not have an autonomous character. The Court has stated that it does not have an absolute scope. There are, however, numerous examples of its application.

1. Non-autonomous nature of Article 14

First of all, it is appropriate to point out the non-autonomous nature of Article 14: it cannot be applied unless it is taken together with another article of the Convention. In the Rasmussen v. Denmark case (28 November 1984, Series A no. 87, p. 12, para. 29) it is clearly stated that:

> Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions [...] . there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, inter alia, the Van der Mussele judgment of 23 November 1983, Series A no. 70, p. 22, para. 43).

However, the following point must be made. Provided that Article 14 is relied on together with one of the clauses of the Convention, it may apply even if there has been no breach of the requirements of that clause. The Court had already indicated this in the Belgian Linguistics case. In the National Union of Belgian Police judgment it repeated the terms more explicitly (judgment of 27 October 1975, Series A no. 19, p. 19, para. 44):

> Although the Court has found no violation of Article 11 para. 1, it has to be ascertained whether the differences in treatment complained of by the applicant union contravene Articles 11 and 14 taken together. Although Article 14 has no independent existence, it is complementary to the other normative provisions of the Convention and Protocols: it safeguards individuals, or groups of individuals, placed in comparable situations, from all discrimination in the enjoyment of the rights and freedoms set forth in those provisions. A measure which in itself is in conformity with the requirements of the article enshrining the right or freedom in question may therefore infringe this article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature. It is as though Article 14 formed an integral part of each of the articles laying down rights and freedoms whatever their nature (case relating to certain aspects of the laws on the use of languages in education in Belgium, judgment of 23 July 1968, Series A no. 6, pp. 33-34, para. 9).
>
> These considerations apply in particular where a right embodied in the Convention and the corresponding obligation on the part of the state are not defined precisely, and consequently the state has a wide choice of the means for making the exercise of the right possible and effective.

2. The non-absolute nature of Article 14

In the above-mentioned Belgian Linguistics case the Court indicated that Article 14 did not preclude all differences in treatment (23 July 1968, Series A no. 6, pp. 33-34, para. 10 of the section headed *Interpretation adopted by the Court*):

> In spite of the very general wording of the French version ("*sans distinction aucune*"), Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognised. This version must be read in the light of the more restrictive text of the English version ("without discrimination"). In addition, and in particular, one would reach absurd results were one to give Article 14 an interpretation as wide as that which the French version seems to imply. One would, in effect, be led to judge as contrary to

> the Convention every one of the many legal or administrative provisions which do not secure to everyone complete equality of treatment in the enjoyment of the rights and freedoms recognised. The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities. The extensive interpretation mentioned above cannot consequently be accepted.

In the Lithgow and Others v. the United Kingdom judgment (8 July 1986, Series A no. 102, pp. 66-67, para. 177) the Court recalled the criteria which it uses and the steps which it takes when it considers whether or not a measure is discriminatory:

> [Article 14] safeguards persons (including legal persons) who are "placed in analogous situations" against discriminatory differences of treatment; and, for the purposes of Article 14, a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, amongst many authorities, the Rasmussen judgment of 28 November 1984, Series A no. 87, p. 13, para. 35, and p. 14, para. 38). Furthermore, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law; the scope of this margin will vary according to the circumstances, the subject-matter and its background (*ibid*., p. 15, para. 40).

3. Examples of the application of Article 14

There are cases where the Court, after finding that there has been a violation of a clause of the Convention, does not consider it appropriate to consider the problem of the violation of Article 14. Apart from those cases, two categories of decisions can be distinguished: those where the difference in treatment is found to be discriminatory and those where it is acceptable.

Discriminatory differences in treatment

In the Hoffman v. Austria judgment (23 June 1993, Series A no. 255-C, pp. 59-60, paras. 33 and 36) the Court condemned the decision of the Austrian Supreme Court, which had based its refusal to confer parental authority on a mother essentially on the fact that she was a Jehovah's Witness. The Court observed:

> there has been a difference in treatment and [...] this difference was on the ground of religion; this conclusion is supported by the tone and phrasing of the Supreme Court's considerations regarding the practical consequences of the applicant's religion.
>
> [...]
>
> In the present context, reference may be made to Article 5 of Protocol No. 7, which entered into force for Austria on 1 November 1988; although it was not prayed in aid in the present proceedings, it provides for the fundamental equality of spouses *inter alia* as regards parental rights and makes it clear that in cases of this nature the interests of the children are paramount.
>
> Where the Austrian Supreme Court did not rely on the Federal Act on the Religious Education of Children, it weighed the facts differently from the courts below, whose reasoning was moreover supported by psychological expert opinion. Notwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable.
>
> The Court therefore cannot find that a reasonable relationship of proportionality existed between the means employed and the aim pursued; there has accordingly been a violation of Article 8 taken in conjunction with Article 14.

In the Burghartz v. Switzerland case (22 February 1994, Series A no. 280-B, pp. 29-30, paras. 27-29) for account of the facts see under Article 8) the Court observed *vis-à-vis* a difference in treatment between

husband and wife concerning the possibility of combining their own surnames with the family name which they had chosen that:

> the advancement of the equality of the sexes is today a major goal in the member states of the Council of Europe; this means that very weighty reasons would have to be put forward before a difference of treatment on the sole ground of sex could be regarded as compatible with the Convention (see, as the most recent authority, the Schuler-Zgraggen v. Switzerland judgment of 24 June 1993, Series A no. 263, pp. 21-22, para. 67).
>
> In support of the system complained of, the Government relied, firstly, on the Swiss legislature's concern that family unity should be reflected in a single joint surname. The Court is not persuaded by this argument, since family unity would be no less reflected if the husband added his own surname to his wife's, adopted as the joint family name, than it is by the converse argument allowed by the Civil Code.
>
> In the second place, it cannot be said that a genuine tradition is at issue here. Married women have enjoyed the right from which the applicant seeks to benefit only since 1984. In any event, the Convention must be interpreted in the light of present-day conditions, especially the importance of the principle of non-discrimination.
>
> Nor is there any distinction to be derived from the spouses' choice of one of their surnames as the family name in preference to the other. Contrary to what the Government contended, it cannot be said to represent greater deliberateness on the part of the husband than on the part of the wife. It is therefore unjustified to provide for different consequences in each case.
>
> As to the other types of surname, such as a double-barred name or any other informal manner of use, the Federal Court itself distinguished them from the legal family name, which is the only one that may appear in a person's official papers. They therefore cannot be regarded as equivalent to it.
>
> In sum, the difference of treatment complained of lacks an objective and reasonable justification and accordingly contravenes Article 14 taken together with Article 8.

In the case of Karlheinz-Schmidt v. Germany (18 July 1994, Series A no. 291-B, p. 33, para. 28) concerning the obligation imposed solely on men to serve in the fire brigade or pay a financial contribution in lieu the Court considers:

> Irrespective of whether or not there can nowadays exist any justification for treating men and women differently as regards compulsory service in the fire brigade, what is finally decisive in the present case is that the obligation to perform such service is exclusively one of law and theory. In view of the continuing existence of a sufficient number of volunteers, no male person is in practice obliged to serve in a fire brigade. The financial contribution has – not in law but in fact – lost its compensatory character and has become the only effective duty. In the imposition of a financial burden such as this, a difference of treatment on the ground of sex can hardly be justified.

In the Gaygusuz v. Austria case (16 September 1996, Reports of Judgments and Decisions 1996-IV, pp. 1142, 1143, paras. 42, 46-50), the applicant was denied emergency assistance under the Unemployment Insurance Act on account of his nationality. The Court first recalled that "very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention":

> The Court notes in the first place that Mr Gaygusuz was legally resident in Austria and worked there at certain times (see paragraph 10 above), paying contributions to the unemployment insurance fund in the same capacity and on the same basis as Austrian nationals.
>
> It observes that the authorities' refusal to grant him emergency assistance was based exclusively on the fact that he did not have Austrian nationality as required by section 33 (2) (*a*) of the 1977 Unemployment Insurance Act (see paragraph 20 above).
>
> In addition, it has not been argued that the applicant failed to satisfy the other statutory conditions for the award of the social benefit in question. He was accordingly in a like situation to Austrian nationals as regards his entitlement thereto.

> Admittedly, sections 33 and 34 of the 1977 Unemployment Insurance Act (see paragraph 20 above) lay down certain exceptions to the nationality condition, but the applicant did not fall into any of the relevant categories.
>
> The Court therefore finds the arguments put forward by the Austrian Government unpersuasive. It considers, like the Commission, that the difference of treatment between Austrians and non-Austrians as regards entitlement to emergency assistance, of which Mr Gaygusuz was a victim, is not based on any "objective and reasonable justification".

The Austrian Government had submitted that "the difference of treatment was based on the idea that the State has special responsibility for its own nationals and must take care of them and provide for their essential needs". Furthermore, the Government argued that " the Unemployment Insurance Act laid down certain exceptions to the nationality condition and that Austria was not bound by any contractual obligation to grant emergency assistance to Turkish nationals".

Lastly, in the Darby v. Sweden case the Court condemned the fact that the applicant had found it impossible to secure a reduction in the special tax for the Church of Sweden granted to person who did not belong to that church on the sole ground that he was not officially registered as a resident (Darby case, 23 October 1990, Series A no. 187, p. 13, paras. 32-34):

> It appears first that Dr Darby can claim to have been, as regards his right to an exemption under the Dissenters Tax Act, in a situation similar to that of other non-members of the Church who were formally registered as residents of Sweden.
>
> As regards the aim of this difference in the treatment of residents and non-residents, it is worth noting the following. According to the Government Bill (1951:175) which gave raise to the Dissenters Tax Act, the reason why the right to exemption was reserved for persons formally registered as residents was that the case for reduction could not be argued with the same force in regard to persons who were not so registered as it could be in regard to those who were, and that the procedure would be more complicated if the reduction was to apply to non-residents (see paragraph 22 above) The Government Bill (1978/79: 58) containing the tax-law amendments that brought about this complaint did not mention the special situation which the amendments would create for non-residents under the Dissenters Tax Act (see paragraph 20 above). In fact, the Government stated at the hearing before the Court that they did not argue that the distinction in treatment had a legitimate aim.
>
> In view of the above, the measure complained of cannot be seen as having had any legitimate aim under the Convention. Accordingly, there has been a violation of Article 14 of the Convention.

Non-discriminatory differences in treatment

In the Abdulaziz, Cabales and Balkandali v. the United Kingdom case (28 May 1985, Series A no. 94, pp. 39-40, paras. 84 and 85) the Court observed in connection with the immigration policy in the United Kingdom:

> A majority of the Commission concluded that there had been no violation of Article 14 under this head. Most immigration policies – restricting, as they do, free entry – differentiated on the basis of people's nationality, and indirectly their race, ethnic origin and possibly their colour. Whilst a Contracting State could not implement "policies of a purely racist nature", to give preferential treatment to its nationals or to persons from countries with which it had the closest links did not constitute "racial discrimination". The effect in practice of the United Kingdom rules did not mean that they were abhorrent on the grounds of racial discrimination, there being no evidence of an actual difference of treatment on grounds of race.
>
> A minority of the Commission, on the other hand, noted that the main effect of the rules was to prevent immigration from the New Commonwealth and Pakistan. This was not coincidental: the legislative history showed that the intention was to "lower the number of coloured immigrants". By their effect and purpose, the rules were indirectly racist and there had thus been a violation of Article 14 under this head in the cases of Mrs Abdulaziz and Mrs Cabales.
>
> The Court agrees in this respect with the majority of the Commission.

In the Rasmussen case the applicant complained that the Danish legislation imposed a time-limit on his right to disown a child born during the marriage although it allowed his ex-wife to take action to challenge paternity at any time. The Court stated (Rasmussen v. Sweden, 28 November 1984, Series A no. 87, pp. 15-16, paras. 41 and 42) that:

> The Court has had close regard to the circumstances and the general background and has borne in mind the margin of appreciation which must be allowed to the authorities in the matter. In its view, they were entitled to think that the introduction of time-limits for the institution of paternity proceedings was justified by the desire to ensure legal certainty and to protect the interests of the child. In this respect, the legislation complained of did not differ substantially from that of most other Contracting States or from that currently in force in Denmark. The difference of treatment established on this point between husbands and wives was based on the notion that such time-limits were less necessary for wives than for husbands since the mother's interests usually coincided with those of the child, she being awarded custody in most cases of divorce or separation.
>
> [...]
>
> The Court thus concludes that the difference of treatment complained of was not discriminatory, within the meaning of Article 14.

In the National Union of Belgian Police judgment (27 October 1975, Series A no. 19, pp. 21-22, para. 49), the Court observed that the absence of consultation of certain trade unions under a decree adopted for the purpose of restricting the number of organisations to be consulted did not constitute a violation of Article 14:

> The Court is of the opinion that the uniform nature [of the criterion employed in the Decree] does not justify the conclusion that the Government has exceeded the limits of its freedom to lay down the measures it deems appropriate in its relations with the trade unions. The Court considers that it has not been clearly established that the disadvantage suffered by the applicant is excessive in relation to the legitimate aim pursued by the Government. The principle of proportionality has therefore not been offended.

In the Belgian Linguistics case the question arose whether the Government could object, in the unilingual regions, to the establishment and subsidy by the state of schools which did not comply with the general linguistic requirements. The Court stated (Belgian Linguistics case, 23 July 1968, Series A no. 6, p. 44, para. 7 first question *in fine*):

> On this point the Court observes that the provisions which are challenged concern only official or subsidised education. They in no way prevent, in the Dutch-unilingual region, the organisation of independent French-language education, which in any case still exists there to a certain extent. The Court, therefore, does not consider that the measures adopted in this matter by the Belgian legislature are so disproportionate [in comparison] to the requirements of the public interest which is being pursued as to constitute a discrimination contrary to Article 14 of the Convention, read in conjunction [with other articles of the Convention].

Article 15 ECHR – General derogatory clauses

Article 15 is worded as follows:

> **1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.**
>
> **2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.**
>
> **3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.**

1. Conditions for the implementation of Article 15

Basic conditions

There are three basic conditions.

"War" or "public emergency threatening the life of the nation"

Specific information on the notions of "war" or "public emergency threatening the life of the nation" can be found in two judgments. The first of these is the Lawless v. Ireland judgment (judgment of 1 July 1961, Series A no. 3, p. 56, para. 28) which concerned special legislation on terrorism connected with Northern Ireland. The Court observed that:

> In the general context of Article 15 of the Convention, the natural and customary meaning of the words "other public emergency threatening the life of the nation" is sufficiently clear; they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed. Having thus established the natural and customary meaning of this conception, the Court must determine whether the facts and circumstances which led the Irish Government to make their Proclamation of 5 July 1957 [relating to a special Act on administrative detention] come within this conception. The Court, after an examination, finds this to be the case; the existence at the time of a "public emergency threatening the life of the nation" was reasonably deduced by the Irish Government from a combination of several factors, namely: in the first place, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the state, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957.

More specifically, it emerges from the Greek case (*Yearbook of the European Convention on Human Rights* 1969, p. 72) that the following criteria must be present before there can be a "public emergency":

> (1) [The danger] must be actual or imminent.
>
> (2) Its effects must involve the whole nation.
>
> (3) The continuance of the organised life of the community must be threatened.
>
> (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.

Strict nature of measures derogating from the Convention

Even where those criteria are present, any measures derogating from the Convention can be adopted only "to the extent strictly required by the exigencies of the situation". In the Ireland v. the United Kingdom judgment the Court indicated (18 January 1978, Series A no. 25, pp. 78-79, para. 207) the nature of its power of review in that regard:

> It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1 leaves those authorities a wide margin of appreciation.
>
> Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements (Article 19), is empowered to rule on whether the States have gone beyond the "extent strictly required by the exigencies" of the crisis (Lawless judgment of 1 July 1961, Series A no. 3, p. 55, para. 22, and pp. 57-59, paras. 36-38). The domestic margin of appreciation is thus accompanied by a European supervision.

In the Lawless case, for example, the Court carried out such supervision. Concerning a special law on administrative detention in derogation from Article 15 of the Convention, the Court observed (pp. 57-58, para. 36):

> However, considering, in the judgment of the Court, that in 1957 the application of the ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland. The ordinary criminal courts, or even the special criminal courts or military courts, could not suffice to restore peace and order; in particular, the amassing of the necessary evidence to convict persons involved in activities of the IRA and its splinter groups was meeting with great difficulties caused by the military, secret and terrorist character of those groups and the fear they created among the population. The fact that these groups operated mainly in Northern Ireland, their activities in the Republic of Ireland being virtually limited to the preparation of armed raids across the border, was an additional impediment to the gathering of sufficient evidence. The sealing of the border would have had extremely serious repercussions on the population as a whole, beyond the extent required by the exigencies of the emergency.
>
> It follows from the foregoing that none of the above-mentioned means would have made it possible to deal with the situation existing in Ireland in 1957. Therefore, the administrative detention – as instituted under the (Amendment) Act of 1940 – of individuals suspected of intending to take part in terrorist activities, appeared, despite its gravity, to be a measure required by the circumstances.

In the case of Brannigan and McBride v. the United Kingdom (26 May 1993, Series A no. 258-B, pp. 51, 52 and 56, paras. 49, 51-54, 66) the applicants *inter alia* submitted that the purported derogation was not a necessary response to any new or altered state of affairs but was the Government's reaction to the decision in Brogan and Others (judgment of 29 November 1988, Series A no. 145) and was lodged merely to circumvent the consequences of this judgment.

> The Court first observes that the power of arrest and extended detention has been considered necessary by the Government since 1974 in dealing with the threat of terrorism. Following the Brogan and Others judgment the Government were then faced with the option of either introducing judicial control of the decision to detain under section 12 of the 1984 Act or lodging a derogation from their Convention obligations in this respect. The adoption of the view by the Government that judicial control compatible with Article 5 para. 3 was not feasible because of the special difficulties associated with the investigation and prosecution of terrorist crime rendered derogation inevitable. Accordingly, the power of extended detention without such judicial control and the derogation of 23 December 1988 being clearly linked to the persistence of the emergency situation, there is no indication that the derogation was other than a genuine response.

Furthermore, the applicants cited the government's declared intention to abide more closely by the Convention in future, and contended that the derogation was an interim measure not provided for by Article 15, and was thus premature.

> The Court does not accept the applicant's argument that the derogation was premature.
>
> While it is true that Article 15 does not envisage an interim suspension of Convention guarantees pending consideration of the necessity to derogate, it is clear from the notice of derogation that "against the background of the terrorist campaign, and the overriding need to bring terrorists to justice, the Government did not believe that the maximum period of detention should be reduced". However, it remained the Government's wish "to find a judicial process under which extended detention might be reviewed and, where appropriate, authorised by a judge or other judicial officer" (see paragraph 31 above).
>
> The validity of the derogation cannot be called into question for the sole reason that the Government had decided to examine whether in the future a way could be found for ensuring greater conformity with Convention obligations. Indeed, such a process of continued reflection is not only in keeping with Article 15 para. 3 which requires permanent review of the need for emergency measures but is also implicit in the very notion of proportionality.

The Court concluded:

> Having regard to the nature of the terrorist threat in Northern Ireland, the limited scope of the derogation and the reasons advanced in support of it, as well as the existence of basic safeguards against abuse, the Court takes the view that the Government have not exceeded their margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation.

Absence of inconsistency with other obligations under international law

The last condition is that the measures derogating from the Convention must not be "inconsistent with [the state's] other obligations under international law". This seems never to have caused problems. The Court habitually observes that (the above-mentioned Lawless judgment, p. 60, para. 41):

> No facts have come to the knowledge of the Court which give it cause to hold that the measures taken by the Irish Government derogating from the Convention may have conflicted with the said Government's other obligations under international law.

In the above-mentioned Brannigan and McBride v. the United Kingdom judgment the applicants contended that a public emergency has not been "officially proclaimed", as required by Article 4 of the 1966 United Nations International Covnenant on Civil and Political Rights (pp. 56-57, paras. 68, 72, 73).

> The Court observes that it is not its role to seek to define authoritatively the meaning of the terms "officially proclaimed" in Article 4 of the Covenant. Nevertheless it must examine whether there is any plausible basis for the applicant's argument in this respect.
>
> In his statement of 22 December 1988 to the House of Commons the Secretary of State for the Home Department explained in detail the reasons underlying the Government's decision to derogate and announced that steps were being taken to give notice of derogation under both Article 15 of the European Convention and Article 4 of the Covenant. He added that there was "a public emergency within the meaning of these provisions in respect of terrorism connected with the affairs of Northern Ireland in the United Kingdom [...]" (see paragraph 30 above).
>
> In the Court's view the above statement, which was formal in character and made public the Government's intentions as regards derogation, was well in keeping with the notion of an official proclamation. It therefore considers that there is no basis for the applicant's arguments in this respect.

Formal conditions of derogations from Article 15

Article 15 para. 3 concerns the formal conditions required for the implementation of measures derogating from the Convention. In the Lawless case (1 July 1961, Series A no. 3, pp. 61-62, para. 47)

the Court considered whether those conditions had been met. It also provided some information on their content:

> The Court is called upon in the first instance to examine whether, in pursuance of paragraph 3 of Article 15 of the Convention, the Secretary-General of the Council of Europe was duly informed both of the measures taken and of the reasons therefor. The Court notes that a copy of the Offences against the State (Amendment) Act 1940 and a copy of the Proclamation of 5 July, published on 8 July 1957, bringing into force Part II of the aforesaid Act, were attached to the letter of 20 July; that it was explained in the letter of 20 July that the measures had been taken in order "to prevent the commission of offences against public peace and order and to prevent the maintaining of military or armed forces other than those authorised by the Constitution"; that the Irish Government thereby gave the Secretary-General sufficient information of the measures taken and the reasons therefor; that, in the second place, the Irish Government brought this information to the Secretary-General's attention only twelve days after the entry into force of the measures derogating from their obligations under the Convention; and that the notification was therefore made without delay. In conclusion, the Convention does not contain any special provision to the effect that the Contracting State concerned must promulgate in its territory the notice of derogation addressed to the Secretary-General of the Council of Europe.
>
> The Court accordingly finds that, in the present case, the Irish Government fulfilled their obligations as Party to the Convention under Article 15 (3) of the Convention.

2. Scope of Article 15

As stated in paragraph 1 of Article 15, clauses derogating from the Convention can concern " [a state's] obligations under this Convention". However, this general statement is limited by paragraph 2. Thus there can be no derogation from Articles 3, 4 (paragraph 1) or 7. The same applies to Article 2, except in respect of deaths resulting from lawful acts of war. It will be observed, however, that everything depends on the definition of "lawful".

Article 16 ECHR – Restrictions on the political activity of aliens

Article 16 is worded as follows:

> **Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.**

The Court has not often had occasion to rule on the application of this provision. In a recent case, however, (Piermont v. France judgment of 27 April 1995, Series A no. 314, paras. 62-64) the question arose of an expulsion order from French Polynesia and an exclusion order from New Caledonia adopted against a German national who was a Member of the European Parliament and who had taken part in a demonstration in Polynesian territory condemning nuclear tests and the French presence in the Pacific. The applicant maintained that these measures involved a violation of Article 10, to which the government responded that such actions were justified under Article 16. The Court observed that:

> The applicant replied that the restrictions in Article 16 did not apply in her case because of her dual status as a European citizen and an MEP. To object that she was an alien when the nature of her functions entailed taking an interest in the whole of the Community's territory seemed to her to be beside the point.
>
> [...]
>
> The Commission accepted the applicant's submissions in substance.
>
> The Court cannot accept the argument based on European citizenship, since the Community treaties did not at the time recognise any such citizenship. Nevertheless, it considers that Mrs Piermont's possession of the nationality of a member state of the European Union and, in addition to that, her status as a member of the European Parliament do not allow Article 16 of the Convention to be raised against her, especially as the people of the OTs take part in the European Parliament elections.
>
> In conclusion, this provision did not authorise the state to restrict the applicant's exercise of the right guaranteed in Article 10.

Article 17 ECHR – Prohibition on the abuse of rights

Article 17 is worded as follows:

> **Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.**

Article 17 prohibits the use of any provision of the Convention for the purpose of undermining the rights established by it. In the same way, its provisions may not be used in order to limit those rights to a greater extent than the Convention itself permits.

1. Scope of the prohibition on aiming at the destruction of the rights and freedoms set forth in the Convention

The following case shows how the Convention may not be used against itself.

In the case of Glimmerveen and Hagenbeek v. the Netherlands the applicants were convicted for having possessed with a view to distribution of leaflets considered to be inciting to racial discrimination. They were also prevented from participating in the municipal elections since this could reasonably be considered as a disguised act of the prohibited association – i.e. a racist political party. The applicants invoked Article 10 of the Convention. In its decision (11 October 1979, DR 18, p. 196) the Commission considered as follows:

> the Government have drawn the attention of the Commission in particular in the light of Article 60 of the Convention, to the Netherlands' international obligations under the International Convention on the Elimination of all Forms of Racial Discrimination of 1965, to which the Netherlands acceded in 1971.
>
> The Netherlands' authorities in allowing the applicants to proclaim freely and without penalty their ideas would certainly encourage the discrimination prohibited by the European Convention on Human Rights referred to above and the above mentioned Convention of New York of 1965.
>
> The Commission holds the view that the expression of the political ideas of the applicants clearly constitutes an activity within the meaning of Article 17 of the Convention.
>
> The applicants are essentially seeking to use Article 10 to provide a basis under the Convention for a right to engage in these activities which are, as shown above, contrary to the text and spirit of the Convention and which right, if granted, would contribute to the destruction of the rights and freedoms referred to above.
>
> Consequently, the Commission finds that the applicants cannot, by reason of the provisions of Article 17 of the Convention, rely on Article 10 of the Convention.

The Commission did also not find it necessary to determine the questions about violation of Article 3 of Protocol No. 1:

> as it considers that the applicants intended to participate in these elections and to avail themselves of the above right for a purpose which the Commission has just found to be unacceptable under Article 17 in relation to the complaints under Article 10 of the Convention.

Article 17 also prohibits the deprivation of the rights guaranteed by Articles 5 and 6.

In the Lawless v. Ireland case (1 July 1961, Series A no. 3, pp. 44-45, paras. 5-7) the Government had maintained a very restrictive position which the Court did not accept. It declared that no person should be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the rights and freedoms protected by it. And Article 7 may not be construed as depriving a physical person of the fundamental individual rights guaranteed by Articles 5 and 6 of the Convention. The Court stated:

> The Irish Government submitted to the Commission and reaffirmed before the Court (i) that G. R. Lawless, at the time of his arrest in July 1957, was engaged in IRA activities; (ii) that the Commission, in paragraph 138 of its Report, had already observed that his conduct was "such as to draw upon the applicant the gravest suspicion that, whether or not he was any longer a member, he was still concerned with the activities of the IRA at the time of his arrest in July 1957"; (iii) that the IRA was banned on account of its activity aimed at the destruction of the rights and freedoms set forth in the Convention; that, in July 1957, G. R. Lawless was thus concerned in activities falling within the terms of Article 17 of the Convention; that he therefore no longer had a right to rely on Articles 5, 6, 7 or any other Article of the Convention; that no state, group or person engaged in activities falling within the terms of Article 17 of the Convention may rely on any of the provisions of the Convention; that this construction was supported by the Commission's decision on the admissibility of the application submitted to it in 1957 by the German Communist party; [...]
>
> In the opinion of the Court the purpose of Article 17, in so far as it refers to groups or to individuals, is to make it impossible for them to derive from the Convention a right to engage or perform any act aimed at destroying in any activity any of the rights and freedoms set forth in the Convention. Therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms. This provision, which is negative in scope, cannot be construed *a contrario* as depriving a physical person of the fundamental individual rights guaranteed by Articles 5 and 6 of the Convention. In the present instance G.R. Lawless has not relied on the Convention in order to justify or perform acts contrary to the rights and freedoms recognised therein but has complained of having been deprived of the guarantees granted in Articles 5 and 6 of the Convention. Accordingly, the Court cannot, on this ground, accept the submissions of the Irish Government.

2. The prohibition of limitation of the rights and freedoms to a greater extent than is provided for in the Convention

There are few examples of the treatment of this provision by the Court.

In the Engel and Others v. the Netherlands case (8 June 1976, Series A no. 22, pp. 42-43, para. 104) the Court declared that if these limitations are justified in the light of the derogating clauses specific to the various articles there is no need to consider whether there had been a violation of Article 17. Thus the Court observed:

> Mr Dona and Mr Schul further claim that, contrary to Articles 17 and 18, the exercise of their freedom of expression was subject to "limitation to a greater extent than is provided for" in Article 10 and for a "purpose" not mentioned therein.
>
> The complaint does not support examination since the Court has already concluded that the said limitation was justified under paragraph 2 of Article 10 (see paragraphs 96-101 above).

In the same spirit, but conversely, the Court held in the Sporrong and Lönnroth v. Sweden case (23 September 1982, Series A no. 52, p. 28, para. 76) that there was no need to consider whether there had been a violation of Article 17 because it had already found that there had been a violation of another article:

> The applicants also relied on Articles 17 and 18 of the Convention. They claimed that the exercise of their right to the peaceful enjoyment of their possessions was subjected to "restrictions that were more far-reaching than those contemplated" by Article 1 of Protocol No. 1 and had a "purpose" that is not mentioned in that article.
>
> The Commission concluded unanimously that there had been no violation.
>
> Having found that there was a breach of Article 1 of Protocol No. 1, the Court does not consider it necessary also to examine the case under Articles 17 and 18 of the Convention.

Article 18 ECHR – Limits on the use of restrictions to rights

Article 18 is worded as follows:

> **The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.**

As regards this article, reference should be made to the last two extracts cited under Article 17.

Part 2
The additional protocols

The additional protocols contain numerous provisions, but only certain of these are regularly invoked by litigants. We shall therefore deal only with those which are of general interest.

Protocol No. 1

Article 1 of Protocol No. 1

Article 1 of Protocol No. 1 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.**

The Sporrong and Lönnroth judgment (23 September 1982, Series A no. 52) provides an analysis of this article. In the James and Others v. the United Kingdom case (21 February 1986, Series A no. 98, pp. 29-30, para. 37) the Court gave a summary of the main lines of its earlier analysis:

> Article 1 in substance guarantees the right of property (see the Marckx judgment of 13 June 1979, Series A no. 31, pp. 27-28, para. 63). In its judgment of 23 September 1982 in the case of Sporrong and Lönnroth, the Court analysed Article 1 as comprising "three distinct rules": the first rule, set out in the first sentence of the first paragraph, is of a general nature an enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest (Series A no. 52, p. 24, para. 61). The Court further observed that, before inquiring whether the first general rule has been complied with, it must determine whether the last two are applicable (*ibid.*). The three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.

As may be seen, Article 1 sets forth three distinct guarantees presented respectively in its three sentences. We shall look first at the last two, and afterwards at the first, which plays only a subsidiary role. But before this, we must examine the scope of application of Article 1 and the meaning of the term "possessions", as well as the extent of the legal protection guaranteed.

1. Scope of Article 1 of Protocol No. 1

As the first sentence states, Article 1 refers to "possessions". Some examples of the notion of "possessions" should be given here.

In the Gasus Dosier- und Födertechnik GmbH v. the Netherlands case (23 February 1995, Series A no. 306-B, p. 46, para. 53) a number of principles concerning the nature of the possessions referred to in Article 1 are set out. In that case the applicant had sold a concrete-mixer with a retention of title clause. The question for the Court was whether Article 1 was applicable. The Court stated:

> The Court recalls that the notion "possessions" (in French: *biens*) in Article 1 of Protocol No. 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions", for the purposes of this provision. In the present context it is therefore immaterial whether Gasus's right to the concrete-mixer is to be considered as a right of ownership or as a security right *in rem*. In any event, the seizure and sale of the concrete-mixer constituted an "interference" with the applicant company's right "to the peaceful enjoyment" of a "possession" within the meaning of Article 1 of Protocol No. 1.

The Van Marle and Others v. the Netherlands case even treats an accountant's clientele in the same way as property (26 June 1986, Series A no. 101, p. 13, paras. 41-42).

> The Court agrees with the Commission that the right relied upon by the applicants may be likened to the right of property embodied in Article 1: by dint of their own work, the applicants had built up a clientele; this had in many respects the nature of a private right and constituted an asset and, hence, a possession within the meaning of the first sentence of Article 1. This provision was accordingly applicable in the present case.

In the Van der Mussele v. Belgium judgment (23 November 1983, Series A no. 70, pp. 23-24, paras. 47-49) the Court found Article 1 of Protocol No. 1 not applicable. The obligation imposed on this lawyer, who was officially assigned to provide services, did not deprive him of existing "possessions", while his costs were modest and connected with the performance of a service.

> Mr Van der Mussele finally relied on Article 1 of Protocol No. 1.
>
> [...]
>
> His arguments do not bear examination in so far as they relate to the absence of remuneration. The text set out above is limited to enshrining the right of everyone to the peaceful enjoyment of "his" possessions; it thus applies only to existing possessions (see, *mutatis mutandis*, the above-mentioned Marckx judgment, Series A no. 31, p. 23, para. 50). In the instant case, however, the Legal Advice and Defence Office of the Antwerp Bar decided on 18 December 1979 that no assessment of fees could be made, because of Mr Ebrima's lack of means (see paragraph 12 above). It follows, as the Commission unanimously inferred, that no debt in favour of the applicant ever arose in this respect.
>
> Consequently, under this head, there is no scope for the application of Article 1 of Protocol No. 1, whether taken on its own or together with Article 14 of the Convention; moreover, Mr Van der Mussele invoked the latter Article solely in conjunction with Article 4.
>
> The matter cannot be put in the same terms as far as the non-reimbursement of expenses is concerned, since Mr Van der Mussele was required to pay certain sums out of his own pocket in this connection (see paragraph 12 above).
>
> That does not suffice, however, to warrant the conclusion that Article 1 of Protocol No. 1 is applicable.
>
> In many cases, a duty prescribed by law involves a certain outlay for the person bound to perform it. To regard the imposition of such a duty as constituting in itself an interference with possessions for the purposes of Article 1 of Protocol No. 1 would be giving the Article a far-reaching interpretation going beyond its object and purpose.
>
> The Court sees no valid cause to think otherwise in the instant case.
>
> The expenses in question were incurred by Mr Van der Mussele in acting for his *pro Deo* clients. Although in no wise derisory (the epithet bestowed on them by the Government), these expenses were relatively small and resulted from the obligation to perform work compatible with Article 4 of the Convention.

> Article 1 of Protocol No. 1, whether taken alone or in conjunction with Article 14 of the Convention, is thus not applicable in this connection.

Note that this case is concerned particularly with the *nature* of the possessions.

According to the Marckx v. Belgium judgment (13 June 1979: Series A no. 31, p. 23, para. 50), Article 1 protects only existing possessions. In that case the applicant complained that Belgian law prevented her from acquiring goods on inheritance. The Court stated:

> As concerns the second applicant, the Court has taken its stand solely on Article 8 of the Convention, taken both alone and in conjunction with Article 14. The Court in fact excludes Article 1 of Protocol No. 1: like the Commission and the Government, it notes that this Article does no more than enshrine the right of everyone to the peaceful enjoyment of "his" possessions, that consequently it applies only to a person's existing possessions and that it does not guarantee the right to acquire possessions whether on intestacy or through voluntary dispositions. Besides, the applicants do not appear to have relied on this provision in support of Alexandra's claims. Since Article 1 of the Protocol proves to be inapplicable, Article 14 of the Convention cannot be combined with it on the point now being considered.

As the Court said in the Stran Greek Refineries and Stratis Andreadis v. Greece judgment (9 December 1994, Series A no. 301-B, pp. 84-85, paras. 58 to 62), the possession at issue must be sufficiently established in its existence. In that case a claim had formed the subject-matter of numerous proceedings before the ordinary courts and before an arbitration board. Be that is it may, the question was whether, as the Government argued, "neither [the] judgment [...] nor the arbitration award was sufficient to establish the existence of a claim" and therefore the existence of a possession. The Court pointed out the influence which the questions of procedure had on the existence of a possession and thereby defined the characteristics of the possessions referred to in that Article. The Court stated that:

> The principal thrust of the Government's argument was that no "possession" of the applicants, within the meaning of Article 1 of Protocol No. 1, had been subject to interference through the operation of Law No. 1701/1987.
>
> In their view, neither judgment no. 13910/79 nor the arbitration award was sufficient to establish the existence of a claim against the state. A judicial decision that had not yet become final, or an arbitration award, could not be equated to the right which might be recognised by such decision or award.
>
> In order to determine whether the applicants had a "possession" for the purpose of Article 1 of Protocol No. 1, the Court must ascertain whether judgment No. 13910/79 of the Athens Court of First Instance and the arbitration award had given rise to a debt in their favour that was sufficiently established to be enforceable.
>
> In the nature of things, a preliminary decision prejudges the merits of a dispute by ordering an investigative measure. Although the Athens Court of First Instance would appear to have accepted the principle that the state owed a debt to the applicants – as the Commission likewise noted – it nevertheless ordered that witnesses be heard (see paragraph 11 above) before ruling on the existence and extent of the alleged damage. The effect of such a decision was merely to furnish the applicants with the hope that they would secure recognition of the claim put forward. Whether the resulting debt was enforceable would depend on any review by two superior courts.
>
> This is not the case with regard to the arbitration award, which clearly recognised the state's liability up to a maximum of specified amounts in three different currencies (see paragraph 13 above).
>
> The Court agrees with the Government that it is not its task to approve or disapprove the substance of that award. It is, however, under a duty to take note of the legal position established by that decision in relation to the parties.
>
> According to its wording, the award was final and binding; it did not require any further enforcement measure and no ordinary or special appeal lay against it (see paragraph 10 above). Under Greek legislation arbitration awards have the force of final decisions and are deemed to be enforceable. The grounds for

> appealing against them are exhaustively listed in Article 897 of the Code of Civil Procedure (see paragraph 25 above); no provision is made for an appeal on the merits.
>
> At the moment when Law No. 1701/1987 was passed the arbitration award of 27 February 1984 therefore conferred on the applicants a right in the sums awarded. Admittedly, that right was revocable, since the award could still be annulled, but the ordinary courts had by then already twice held – at first instance and on appeal – that there was no ground for such annulment. Accordingly, in the Court's view, that right constituted a "possession" within the meaning of Article 1 of Protocol No. 1.

In the case of Matos e Silva, Lda. and Others v. Portugal (16 September 1996, Collection of judgments and decisions 1996-IV, p. 1111, para. 75) the Court had to consider whether the applicants had a "possession" in the sense of Article 1 of Protocol No. 1. Matos e Silva is a private limited company involved in land cultivation, fish-farming and salt extraction. Of the land it works, some is owned by the company and some is held as a concession. The Court stated:

> Like the Commission, the Court notes that the ownership of part of the land is not contested.
>
> As to the other part ... the Court agrees with the Government that it is not for the Court to decide whether or not a right of property exists under domestic law. However, it recalls that the notion "possessions" (in French: "*biens*") in Article 1 of Protocol No. 1 has an autonomous meaning (see the Gasus Dosier- und Fördertechnik GmbH v. the Netherlands judgment of 23 February 1995, Series A no. 306-B, p. 46, para. 53). In the present case the applicants' unchallenged rights over the disputed land for almost a century and the revenue they derive from working it may qualify as "possessions" for the purposes of Article 1.

2. Extent of the legal guarantees covering possessions established by Article 1 of Protocol No. 1

It is appropriate in this context to mention the Marckx judgment (13 June 1979, Series A no. 31, p. 27, para. 63), where the Court clearly stated that the right to dispose of one's possessions is protected by Article 1. It therefore follows from that case that Article 1 provides protection not only against interference with possessions in the form of expropriation but also against interference with the elements flowing from the ownership of the possessions. The Court stated:

> The Court takes the same view as the Commission. By recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property. This is the clear impression left by the words "possessions" and "use of property" (in French: "*biens*", "*propriété*", "*usage des biens*"); the "*travaux préparatoires*", for their part, confirm this unequivocally: the drafters continually spoke of "right of property" or "right to property" to describe the subject-matter of the successive drafts which were the forerunners of the present Article 1.

And further:

> Indeed, the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property (cf. the Handyside judgment of 7 December 1976, Series A no. 24, p. 29, para. 62).

In another case (the Sporrong and Lönnroth v. Sweden judgment of 23 September 1982, Series A no. 52, pp. 23-24, para. 60), the Court upheld that principle. In that case permits had been issued to the town of Stockholm allowing it to expropriate specific properties for several years. Those permits were accompanied by prohibitions on construction for the owners. The Court stated that:

> Although the expropriation left intact in law the owners' right to use and dispose of their possessions, they nevertheless in practice significantly reduced the possibility of its exercise. They also affected the very substance of ownership in that they recognised before the event that any expropriation would be lawful and authorised the city of Stockholm to expropriate whenever it found it expedient to do so. The applicants' right of property thus became precarious and defeasible.
>
> The prohibitions on construction, for their part, undoubtedly restricted the applicants' right to use their possessions.

> There was therefore an interference with the applicants' right of property and, as the Commission rightly pointed out, the consequences of that interference were undoubtedly rendered more serious by the combined use, over a long period of time, of expropriation permits and prohibitions on construction.

The Court is therefore applying here the third sentence of Article 1. This leads us to the examination of the conditions laid down by Article 1 for the safeguard of property and possessions.

3. Article 1 of Protocol No. 1, second sentence: deprivation of property

The second sentence of Article 1 (quoted in full above) is worded as follows:

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 second sentence of Article 1 refers to " [deprivation] of possessions" to the exclusion of other interference with goods, which fall within the scope of the third sentence of that article.

The concept of "deprivation"

It is appropriate to determine what "deprivation of a possession" is. It refers to expropriation, but not solely to expropriation, which represents only one way of depriving a person of his possessions.

Expropriation

There is no expropriation where the prerogatives flowing from the right of property are preserved. Thus in the Sporrong and Lönnroth case (the facts of which are set out above) the Court observed (p. 24, para. 62):

> It should be recalled first of all that the Swedish authorities did not proceed to an expropriation of the applicants' properties. The applicants were therefore not formally "deprived" of their possessions at any time: they were entitled to use, sell, devise, donate or mortgage their properties.

However, it is still essential that those prerogatives are actually preserved. In the same case, the Court went on to state (pp. 24-25, para. 63):

> In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of (see, *mutatis mutandis*, the Van Droogenbroeck judgment of 24 June 1982, Series A no. 50, p. 20, para. 38). Since the Convention is intended to guarantee rights that are "practical and effective" (the Airey judgment of 9 October 1979, Series A no. 32, p. 12, para. 24), it has to be ascertained whether that situation amounted to a de facto expropriation, as was argued by the applicants.
>
> In the Court's opinion, all the effects complained of (see paragraph 58 above) stemmed from the reduction of the possibility of disposing of the properties concerned. Those effects were occasioned by limitations imposed on the right of property, which right had become precarious, and from the consequences of those limitations on the value of the premises. However, although the right in question lost some of its substance, it did not disappear. The effects of the measures involved are not such that they can be assimilated to a deprivation of possessions. The Court observes in this connection that the applicants could continue to utilise their possessions and that, although it became more difficult to sell properties in Stockholm affected by expropriation permits and prohibitions on construction, the possibility of selling subsisted; according to information supplied by the Government, several dozen sales were effected (see paragraph 30 above).

The second sentence of the first paragraph was therefore not applicable in that case.

The Court recognised the existence of such a *de facto* expropriation in the Papamichalopoulos and others v. Greece judgment (24 June 1993, Series A no. 260-B, pp. 69-70**,** paras. 41-46). In that case the army had occupied land on the basis of Law No. 109/1967. The Court observed:

> The occupation of the land in issue by the Navy Fund represented a clear interference with the applicants' exercise of their right to the peaceful enjoyment of their possessions. The interference was not for the purpose of controlling the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1. Moreover, the applicants were never formally expropriated: Law No. 109/67 did not transfer ownership of the land in question to the Navy Fund.
>
> Since the Convention is intended to safeguard rights that are "practical and effective", it has to be ascertained whether the situation complained of amounted nevertheless to a de facto expropriation, as was argued by the applicants (see, among other authorities, the Sporrong and Lönnroth v. Sweden judgment of 23 September 1982, Series A no. 52, para. 63).
>
> It must be remembered that in 1967, under a Law enacted by the military government of the time, the Navy Fund took possession of a large area of land which included the applicants' land; it established a naval base there and a holiday resort for officers and their families.
>
> From that date the applicants were unable either to make use of their property or to sell, bequeath, mortgage or make of gift of it; Mr Petros Papamichalopoulos, the only one who obtained a final court decision ordering the Navy to return his property to him, was even refused access to it (see paragraphs 11-12 above).
>
> [...]
>
> The Court considers that the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants de facto to have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions.
>
> There had therefore been, and there continued to be, a violation of Article 1 of Protocol No. 1.

In addition to cases of expropriation such as those illustrated by these extracts, there may exist other types of deprivation of possessions as understood by the second sentence of Article 1.

Other examples of deprivation of possessions

There may be deprivation where possessions are pre-empted. An example is provided by the Hentrich v. France case (22 September 1994, Series A no. 296-A, p. 18, para. 35), where the tax authorities had used the statutory right of pre-emption available where the price paid on the sale of immovable property between individuals is insufficient. The Court observed:

> Because the right of pre-emption was exercised, Mrs Hentrich was deprived of her property within the meaning of the second sentence of the first sub-paragraph of Article 1; the Government did not contest that.

It may also occur where possessions are confiscated. On this point, case-law is quite clear. In the Handyside case (Handyside v. the United Kingdom, 7 December 1976, Series A no. 24, p. 30, para. 63) we read:

> The forfeiture and destruction of the *Schoolbook*, on the other hand, permanently deprived the applicant of the ownership of certain possessions. However, these measures were authorised by the second paragraph of Article 1 of Protocol No. 1, interpreted in the light of the principle of law, common to the Contracting States, whereunder items whose use has been lawfully adjudged illicit and dangerous to the general interest are forfeited with a view to destruction.

See for another example the AGOSI v. the United Kingdom judgment of 24 October 1986, Series A no. 108 concerning the seizure and forfeiture of smuggled Kruegerrands.

In the Raimondo v. Italy case, however, the Court observed (22 February 1994, Series A no. 281-A, p. 16, para. 29) that confiscation does not necessarily fall within the scope of the second sentence. This implies that it might do so. The Court stated:

> Although it involves a deprivation of possessions, confiscation of property does not necessarily come within the scope of the second sentence of the first paragraph of Article 1 of Protocol No. 1 (see the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 30, para. 63, and the AGOSI v. the United Kingdom judgment of 24 October 1986, Series A no. 108, p. 17, para. 51).

This leads us to discuss the definitive character of the deprivation of possessions.

Requirement that the deprivation be definitive

Although the Court considered in the aforementioned Raimondo case that the second sentence did not apply to confiscation, this was because the confiscation was not definitive (*ibid*., pp. 16-17, para. 29):

> According to Italian case-law, confiscation of the kind which is in issue in this case could not moreover have the effect of transferring ownership to the state until there had been an irrevocable decision (see paragraph 20 above). There was no such decision in this instance because Mr Raimondo had challenged the order of the Catanzaro District Court of 16 October 1985 (see paragraph 13 above). Here too therefore it is the second paragraph of Article 1 which applies.

The Court has also applied this principle in relation to expropriation. Thus in the Poiss v. Austria case (23 April 1987, Series A no. 117) the following can be read (p. 108, para. 64):

> The Court notes first of all that the Austrian authorities did not effect either a formal expropriation or a de facto expropriation (see the Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p. 24, paras. 62-63). The transfer carried out in April 1963 was a provisional one; only the entry into force of a consolidation plan will make it irrevocable (see paragraph 32 above). The applicants may therefore recover their land if the final plan does not confirm the distribution made at the earlier stage of the proceedings. Accordingly, it cannot be said that the applicants have been definitively "deprived of their possessions" within the meaning of the second sentence of the first paragraph of Article 1.

Conditions for the application of Article 1, second sentence

There are three conditions which the deprivation of possessions must satisfy: the deprivation must be "in the public interest", the conditions provided for by law must be respected and the general principles of international law must be observed.

The requirement that the deprivation be "in the public interest"

In the James and Others v. the United Kingdom case (22 February 1986, Series A no. 98, p. 32, para. 46) the Court observed in connection with the "public interest" condition:

> Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken (see, *mutatis mutandis*, the Handyside judgment of 7 December 1976, Series A no. 24, p. 22, para. 48). Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.
>
> Furthermore, the notion of "public interest" is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation. In other words, although the Court cannot substitute its own assessment for that of the national authorities, it is bound to review the contested measures under Article 1 of Protocol No. 1 and, in so doing, to make an inquiry into the facts with reference to which the national authorities acted.

In application of these principles, the Court ascertains whether the "public interest" aim claimed by the authorities is lawful, or rather that it is not "manifestly unreasonable" (*ibid*., p. 34, para. 49):

> The Court therefore agrees with the Commission's conclusion: the United Kingdom Parliament's belief in the existence of a [reason in the public interest] was not such as could be characterised as manifestly unreasonable.

However, the "public interest" condition requires more than a lawful, or not unreasonable, aim. The public interest implies a relationship of proportionality between the aim in view and the means used (*ibid*., p. 34, para. 50), i.e. the deprivation of the possessions.

> This, however, does not settle the issue. Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest", but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, amongst others, and *mutatis mutandis*, the above-mentioned Ashingdane judgment, Series A no. 93, pp. 24-25, para. 57). This latter requirement was expressed in other terms in the Sporrong and Lönnroth judgment by the notion of the "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (Series A no. 52, p. 26, para. 69). The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden" (*ibid*., p. 28, para. 73). Although the Court was speaking in that judgment in the context of the general rule of peaceful enjoyment of property enunciated in the first sentence of the first paragraph, it pointed out that "the search for this balance is [...] reflected in the structure of Article 1" as a whole (ibid., p. 26, para. 69).

The right in question is not expressly mentioned in Article 1, but it is intrinsic to compensation (Holy Monasteries v. Greece case, 9 December 1994, Series A no. 301-A, p. 35, para. 71).

> Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants. In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 only in exceptional circumstances. Article 1 does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest" may call for less than reimbursement of the full market value (see the Lithgow and Others v. the United Kingdom judgment of 8 July 1986, Series A no. 102, pp. 50-51, para. 121).

Lastly, the Court had the opportunity in the James and Others judgment to determine the following point: the fact that the interference with the ownership of possessions is of advantage only to certain persons does not necessarily mean that the deprivation is not in the public interest (the above-mentioned James and Others judgment, pp. 31-32, paras. 41 and 45).

> Neither can it be read into the English expression "in the public interest" that the transferred property should be put into use for the general public or that the community generally, or even a substantial proportion of it, should directly benefit from the taking. The taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being "in the public interest". In particular, the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being "in the public interest", even if they involve the compulsory transfer of property from one individual to another.
>
> The expression "*pour cause d'utilité publique*" used in the French text of Article 1 may indeed be read as having the narrow sense argued by the applicants, as is shown by the domestic law of some, but not all, of the Contracting States where the expression or its equivalent is found in the context of expropriation of property. That, however, is not decisive, as many Convention concepts have been recognised in the Court's case-law as having an "autonomous" meaning. Moreover, the words "*utilité publique*" are also capable of bearing a wider meaning, covering expropriation measures taken in implementation of policies calculated to enhance social justice.

The requirement that the interference be lawful

Here the Court requires two things: the law must not be applied unfairly; and it must be sufficiently clear to allow individuals to be aware of possible interference with their possessions. In the Hentrich v. France judgment (22 September 1994, Series A no. 296-A, p. 19, para. 42) the Court observed in connection with a pre-emption measure:

> In the instant case the pre-emption operated arbitrarily and selectively and was scarcely foreseeable, and it was not attended by the basic procedural safeguards. In particular, Article 668 of the General Tax Code, as interpreted up to that time by the Court of Cassation and as applied to the applicant, did not sufficiently satisfy the requirements of precision and foreseeability implied by the concept of law within the meaning of the Convention.

The need to observe the general principles of international law

In this connection, the Court had the opportunity to state (the above-mentioned James and Others judgment, p. 40, para. 66):

> For all these reasons, the Court concludes that the general principles of international law are not applicable to a taking by a state of the property of its own nationals.

4. Article 1 of Protocol No. 1, third sentence *(*second paragraph*)*

The third sentence of Article 1 is worded as follows:

> **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.**

Conditions for the application of Article 1, third sentence

In the Handyside judgment (7 December 1976, Series A no. 24, p. 29, para. 62 *in fine*) the Court stated:

> Unlike Article 10 para. 2 of the Convention, [the second] paragraph sets the Contracting States up as sole judges of the "necessity" for an interference. Consequently, the Court must restrict itself to supervising the lawfulness and the purpose of the restriction in question.

Even so, it does not follow that every interference is permissible. More generally, the Court recalled in the Gasus Dosier-und Fördertechnik GmbH v. the Netherlands case (22 February 1995, Series A no. 306-B, p. 49, para. 62) that:

> According to the Court's well-established case-law, the second paragraph of Article 1 of Protocol No. 1 must be construed in the light of the principle laid down in the article's first sentence (see, among many other authorities, the AGOSI judgment, *ibid*.). Consequently, an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued.

The final part of the previous extract also means that the Court will verify the aim and proportionality of the interference.

Examples of the application of Article 1, third sentence (second paragraph)

Measures taken in the social interest

The third sentence applies, for example, in cases of rent control. In that regard, the Court stated in the Mellacher and Others judgment (19 December 1989, Series A no. 169, p. 25, para. 44):

> The Court finds that the measures taken did not amount either to a formal or to a *de facto* expropriation. There was no transfer of the applicants' property nor were they deprived of their right to use, let or sell it. The contested measures which, admittedly, deprived them of part of their income from the property amounted in the circumstances merely to a control of the use of property. Accordingly, the second paragraph of Article 1 applies in this case.

The Court also concluded in relation to rent control (*ibid*., p. 30, para. 57):

> The Court thus reaches the conclusion that when enacting the 1981 Rent Act the Austrian legislature, having regard to the need to strike a fair balance between the general interests of the community and the right of property of landlords in general and of the applicants in particular, could reasonably hold that the means chosen were suited to achieving the legitimate aim pursued. The Court finds that the requirements of the second paragraph of Article 1 of protocol No. 1 were satisfied in relation to the reductions of rent suffered by the applicants pursuant to the 1981 Rent Act.

Punitive and preventive measures

The third sentence also applies to sequestration. On that point the Court observed (Venditteli v. Italy case, 18 July 1994, Series A no. 293-A, p. 12, para. 38):

> Like the Commission, the Court finds that the impugned measure was provided for by law and was designed not to deprive the applicant of his property but only to prevent him from using it. Consequently, the second paragraph of Article 1 of Protocol No. 1 applies in this instance.

The Court also applies the second paragraph to seizure. In the Raimondo v. Italy case (22 February 1994, Series A no. 281-A, p. 16, para. 27) it observed:

> Like the Commission, the Court finds that the seizure was provided for in section 2 ter of the 1965 Act (see paragraph 18 above) and did not purport to deprive the applicant of his possessions but only to prevent him from using them. It is therefore the second paragraph of Article 1 of Protocol No. 1 which is relevant here.

As regards confiscation, reference should be made to Article 1, second sentence.

Other cases

The third sentence is also applicable to prohibitions on construction (Sporrong and Lönnroth v. Sweden, 23 September 1982, Series A no. 52, p. 25, para. 64).

In fact the third sentence applies to every type of regulation *provided for by law*.

5. Article 1 of Protocol No. 1, first sentence

The first sentence of Article 1 is worded as follows:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions.

The subsidiary nature of the first sentence

The first sentence plays a subsidiary role and determines whether there has been an interference by the state where, strictly speaking, there has been no deprivation of possessions (second sentence) or control of the use of property (third sentence). Thus in the Sporrong and Lönnroth v. Sweden judgment (23 September 1982, Series A no. 152, p. 25, para. 65), the Court observed in relation to an expropriation permit:

> the expropriation permits were not intended to limit or control [the use of possessions]. Since they were an initial step in a procedure leading to deprivation of possessions, they did not fall within the ambit of the second paragraph. They must be examined under the first sentence of the first paragraph.

Thus in the Poiss v. Austria case (23 April 1987, Series A no. 117, pp. 107-108, paras. 62 and 64) the Court stated in connection with the provisional transfer of land:

> There has indisputably been an interference with the applicants' right of property as guaranteed in Article 1 of the protocol (see the Marckx judgment of 13 June 1979, Series A no. 31, p. 27, para. 63): on 22 April 1963, their land was allocated to other landowners, who were parties to the consolidation scheme, or else used for communal measures or facilities, and they have not so far secured, by a final decision, the compensation in kind stipulated by the provincial legislation.
>
> [...]
>
> The Court notes first of all that the Austrian authorities did not effect either a formal expropriation or a *de facto* expropriation (see the Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p. 24, para. 62-63). The transfer carried out in April 1963 was a provisional one; only the entry into force of a consolidation plan will make it irrevocable (see paragraph 32 above). The applicants may therefore recover their land if the final plan does not confirm the distribution made at the earlier stage of the proceedings. Accordingly, it cannot be said that the applicants have been definitively "deprived of their possessions" within the meaning of the second sentence of the first paragraph of Article 1.
>
> Nor was the provisional transfer essentially designed to restrict or control the "use" of the land (second paragraph of Article 1), but to achieve an early restructuring of the consolidation area with a view to improved, rational farming by the "provisional owners" (see paragraph 32 above). The transfer must therefore be considered under the first sentence of the first paragraph of Article 1 (Poiss case, Series A no. 117, para. 64).

The Court again stated this principle in the Stran Greek Refineries and Stratis Andreadis v. Greece judgment (9 December 1994, Series A no. 301-B, p. 86, paras. 67 and 68):

> it was impossible for the applicants to secure enforcement of an arbitration award having final effect and under which the state was required to pay them specified sums in respect of expenditure that they had incurred in seeking to fulfil their contractual obligations or even for them to take further action to recover the sums in question through the courts.
>
> In conclusion, there was an interference with the applicants' property right.
>
> The interference in question was neither an expropriation nor a measure to control the use of property; it falls to be dealt with under the first sentence of the first paragraph of Article 1.

The implementation of Article 1

The relationship between observance of the second and third sentences and observance of the first sentence

The possessions referred to in Article 1 are defined in the James and Others v. the United Kingdom judgment (21 February 1986, Series A no. 98, p. 43, para. 71).

> Alternatively and additionally, the applicants asserted a violation of their rights of peaceful enjoyment of property as guaranteed by the first sentence of Article 1.
>
> The rule (in the second sentence) subjecting deprivation of possessions to certain conditions concerns a particular category, indeed the most radical kind, of interference with the right to peaceful enjoyment of property (see paragraph 37 in fine above); the second sentence supplements and qualifies the general principle enunciated in the first sentence. This being so, it is inconceivable that application of that general principle to the present case should lead to any conclusion different from that already arrived at by the Court in application of the second sentence.

The implementation of the first sentence alone

In the Sporrong and Lönnroth v. Sweden case (23 September 1982, Series A no. 52, p. 26, para. 69) the Court observed:

> The fact that the permits fell within the ambit neither of the second sentence of the first paragraph nor of the second paragraph does not mean that the interference with the said right violated the rule contained in the first sentence of the first paragraph.
>
> For the purposes of the latter provision, the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, *mutatis mutandis*, the judgment of 23 July 1968 in the "Belgian Linguistics" case, Series A no. 6, p. 32, para. 5). The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1.

Article 2 of Protocol No. 1 – The right to an education

Article 2 of Protocol No. 1 is worded as follows:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The Kjeldsen, Busk Madsen and Pedersen v. Denmark judgment (2 December 1976, Series A no. 23, p. 25-26, paras. 51, 52) provides a general remark on this article:

> Article 2, which applies to each of the state's functions in relation to education and to teaching, does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the state to respect the parent's convictions, be they religious or philosophical, throughout the entire state education programme.
>
> As is shown by its very structure, Article 2 constitutes a whole that is dominated by its first sentence. By binding themselves not to "deny the right to education", the Contracting States guarantee to anyone within their jurisdiction "a right of access to educational institutions existing at a given time" and "the possibility of drawing", by "official recognition of the studies which he has completed", "profit from the education received" (judgment of 23 July 1968 on the merits of the "Belgian Linguistics" case, Series A no. 6, pp. 30-32, paras. 3-5.
>
> The right set out in the second sentence of Article 2 is an adjunct of this fundamental right to education (paragraph 50 above). It is in the discharge of a natural duty towards their children – parents being primarily responsible for the "education and teaching" of their children – that parents may require the state to respect their religious and philosophical conviction. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.
>
> On the other hand, "the provisions of the Convention and Protocol must be read as a whole" (above-mentioned judgment of 23 July 1968, *ibid*., p. 30, para. 1). Accordingly, the two sentences of Article 2 must be read not only in the light of each other but also, in particular, of Articles 8, 9 and 10 of the Convention ...

We shall now look at the two sentences which make up Article 2.

1. Article 2 of Protocol No. 1, first sentence – The right to an education

The first sentence reads as follows:

No person shall be denied the right to education.

The Belgian Linguistics case provides the first indication of the meaning of this sentence (judgment of 23 July 1968, Series A no. 6, pp. 31-32, paras. 3-5):

> The first sentence of Article 2 of the Protocol [...] guarantees, in the first place, a right of access to educational institutions existing at a given time, but such access constitutes only a part of the right to

> education. For the "right to education" to be effective, it is further necessary that, *inter alia*, the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each state, and in one form or another, official recognition of the studies which he has completed.

In the same case, the Court stated that (pp. 42-43, para. 7):

> [the problem] principally concerns the state's refusal to establish or subsidise, in the Dutch unilingual region, primary school education (which is compulsory in Belgium) in which French is employed as the language of instruction.
>
> Such a refusal is not compatible with the requirements of the first sentence of Article 2 of the protocol. In interpreting this provision, the Court has already held that it does not enshrine the right to the establishment or subsidising of schools in which education is provided in a given language. The first sentence of Article 2 contains in itself no linguistic requirement. It guarantees the right of access to educational establishments existing at a given time and the right to obtain, in conformity with the rules in force in each state and in one form or another, the official recognition of studies which have been completed, this last right not being relevant to the point which is being dealt with here. In the unilingual regions, both French-speaking and Dutch-speaking children have access to public or subsidised education, that is to say to education conducted in the language of the region.

In the Campbell and Cosans v. the United Kingdom case the Court ruled on the suspension of a child from school (judgment of 25 February 1982, Series A no. 48, p. 19, para. 41). The child had been suspended because both he and his parents were opposed to corporal punishment. As we shall see below, the Court took the view that this punishment was contrary to the second sentence of Article 2 and concluded that the suspension violated the first sentence of that article.

> The right to education guaranteed by the first sentence of Article 2 by its very nature calls for regulation by the state, but such regulation must never injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols (see the judgment of 23 July 1968 on the merits of the "Belgian Linguistics" case, Series A no. 6, p. 32, para. 5).
>
> The suspension of Jeffrey Cosans – which remained in force for nearly a whole school year – was motivated by his and his parents' refusal to accept that he receive or be liable to corporal chastisement (see paragraphs 10-11 above). His return to school could have been secured only if his parents had acted contrary to their convictions, convictions which the United Kingdom is obliged to respect under the second sentence of Article 2 (see paragraphs 35-36 above). A condition of access to an educational establishment that conflicts in this way with another right enshrined in Protocol No. 1 cannot be described as reasonable and in any event falls outside the state's power of regulation under Article 2.
>
> There has accordingly also been, as regards Jeffrey Cosans, breach of the first sentence of that article.

2. Article 2 of Protocol No. 1, second sentence – Respect for the parents' religious and philosophical convictions

The second sentence reads as follows:

> **In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.**

The notion of "religious and philosophical convictions"

In the Campbell and Cosans v. the United Kingdom case (25 February 1982, Series A no. 48, p. 16, para. 36) the Court gave an explanation of the words "philosophical convictions" within the meaning of the second sentence of Article 2.

> In its ordinary meaning the word "convictions", taken on its own, is not synonymous with the words "opinions" and "ideas", such as are utilised in Article 10 of the Convention, which guarantees freedom of expression; it is more akin to the term "beliefs" (in the French text: "*convictions*") appearing in Article 9 – which guarantees freedom of thought, conscience and religion – and denotes views that attain a certain level of cogency, seriousness, cohesion and importance.
>
> As regards the adjective "philosophical", it is not capable of exhaustive definition and little assistance as to its precise significance is to be gleaned from the *travaux préparatoires*. The Commission pointed out that the word "philosophy" bears numerous meanings: it is used to allude to a fully-fledged system of thought or, rather loosely, to views on more or less trivial matters. The Court agrees with the Commission that neither of these two extremes can be adopted for the purposes of interpreting Article 2: the former would too narrowly restrict the scope of a right that is guaranteed to all parents and the latter might result in the inclusion of matters of insufficient weight or substance.
>
> Having regard to the Convention as a whole, including Article 17, the expression "philosophical convictions" in the present context denotes, in the Court's opinion, such convictions as are worthy of respect in a "democratic society" (see, most recently, the Young, James and Webster judgment of 13 August 1981, Series A no. 44, p. 25, para. 63) and are not incompatible with human dignity; in addition, they must not conflict with the fundamental right of the child to education, the whole of Article 2 being dominated by its first sentence (see the Kjeldsen, Busk Madsen and Pedersen judgment of 7 December 1976, Series A no. 23, pp. 25-26, para. 52).

In its judgment in the "Belgian Linguistics" case the Court stated (p. 32, para. 6) that the parents' linguistic preferences could not be considered to be of a philosophical or religious nature, but fell within the ambit of the content of the education, which the second sentence does not guarantee:

> The second sentence of Article 2 of the Protocol does not guarantee a right to education; this is clearly shown by its wording: [...] This provision does not require of states that they should, in the sphere of education or teaching, respect parents' linguistic preferences, but only their religious and philosophical convictions. To interpret the terms "religious" and "philosophical" as covering linguistic preferences would amount to a distortion of their ordinary and usual meaning and to read into the Convention something which is not there.

Scope and consequences of the second sentence of Article 2

Scope of the second sentence from the state's point of view

The Kjeldsen, Busk Madsen and Pedersen v. Denmark judgment (2 December 1976, Series A no. 23, p. 25-26, paras. 51, 52) indicates the interpretation to be given to Article 2 in order to respect the "convictions" of the parents:

> [...] "the provisions of the Convention and Protocol must be read as a whole" (above-mentioned judgment of 23 July 1968, *ibid*., p. 30, para. 1). Accordingly, the two sentences of Article 2 must be read not only in the light of each other but also, in particular, of Articles 8, 9 and 10 of the Convention, which proclaim the right of everyone, including parents and children, "to respect for his private and family life", to "freedom of thought, conscience and religion", and to "freedom [...] to receive and impart information and ideas".

More precisely, it indicates that Article 2 applies to all educational subjects (*ibid*.):

> Article 2, which applies to each of the state's functions in relation to education and to teaching, does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the state to respect the parent's convictions, be they religious or philosophical, throughout the entire state education programme.

The Kjeldsen case also provided the opportunity to cast light on the state's role in defining school curricula (*ibid*., pp. 26-27, para. 53). The Court observed that:

> the setting and planning of the curriculum fall in principle within the competence of the Contracting States. This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and the era. In particular, the second sentence of Article 2 of the protocol does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable. In fact, it seems very difficult for many subjects taught at school not to have, to a greater or lesser extent, some philosophical complexion or implications. The same is true of religious affinities if one remembers the existence of religions forming a very broad dogmatic and moral entity which has or may have answers to every question of a philosophical, cosmological or moral nature.
>
> The second sentence of Article 2 implies on the other hand that the state, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The state is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded.
>
> Such an interpretation is consistent at one and the same time with the first sentence of Article 2 of the Protocol, with Articles 8 to 10 of the Convention and with the general spirit of the Convention itself, an instrument designed to maintain and promote the ideals and values of a democratic society.

In the Kjeldsen case the applicants claimed that sex education was contrary to their beliefs. The Court stated (p. 28, para. 54):

> the disputed legislation in itself in no way offends the applicants' religious and philosophical convictions to the extent forbidden by the second sentence of Article 2 of the Protocol, interpreted in the light of its first sentence and of the whole of the Convention.

The role of the state in the organisation of education is thus defined. The Court stated (*ibid*., p. 24, para. 50):

> The second sentence of Article 2 is binding upon the Contracting States in the exercise of each and every function – it speaks of "any functions" – that they undertake in the sphere of education and teaching, including that consisting of the organisation and financing of public education.

It was in application of this principle that the Court considered that corporal punishment fell within the scope of Article 2, second sentence (the aforementioned Campbell and Cosans case, pp. 15-16, para. 35):

> The functions assumed by the respondent state [in the] area [of education] extend to the supervision of the [...] educational system in general, which must include questions of discipline (see paragraph 34 above).

The Court therefore found that the Government had violated Article 2 by failing to respect the parents' beliefs on the use of corporal punishment (p. 18, para. 38):

> Mrs Campbell and Mrs Cosans have accordingly been victims of a violation of the second sentence of Article 2 of Protocol No. 1.

See above, p. 128, for a discussion of the first sentence of Article 2.

Scope of the second sentence from the parents' point of view

The Kjeldsen, Busk Madsen and Pedersen v. Denmark judgment (*ibid*, pp. 25-26, paras. 51, 52) indicates that the parents' rights in the matter of their convictions are accompanied by a duty:

> It is in the discharge of a natural duty towards their children – parents being primarily responsible for the "education and teaching" of their children – that parents may require the state to respect their religious and philosophical conviction. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.

In the Olsson v. Sweden case the applicants accused the state of violating their beliefs while their child was in the care of the state. The Court observed (Olsson case, 24 March 1988, Series A no. 130, p. 40, paras. 95 and 96):

> The Court agrees with the Commission that the fact that the children were taken into public care did not cause the applicants to lose all their rights under Article 2 of Protocol No. 1.

But the Court found that there had not been a violation of Article 2:

> It notes, however, as did the Commission, that Mr and Mrs Olsson, though describing themselves as atheists, have not left the Church of Sweden (see paragraph 8 above) and that there is no serious indication of their being particularly concerned, except at a rather late stage, with giving the children a non-religious upbringing.
>
> Neither have Mr and Mrs Olsson shown that in practice the general education of the children whilst in public care diverged from what they would have wished.
>
> In these circumstances, no violation of Article 2 of Protocol No. 1 has been established.

The Court has stressed that the second sentence of Article 2 guarantees a right only to parents, not to under-age children. In Eriksson v. Sweden (22 June 1989, Series A no. 156, p. 31, para. 93) Mrs Eriksson's daughter, Lisa, was taken into care by the public authority. In the Court's opinion:

> The complaint under Article 2 of Protocol No. 1 is based only on its second sentence, which guarantees aright of parents, and not on the first, which states that "no person shall be denied the right to education". Lisa therefore cannot claim to be the victim of the alleged violation of Article 2, taken alone or together with Article 13 of the Convention.

Article 3 of Protocol No. 1 – Right to elections

Article 3 of Protocol No. 1 is worded as follows:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

In the Mathieu-Mohin and Clerfayt v. Belgium case (2 March 1987, Series A no. 113, pp. 22-24, paras. 48-54 the Court gave an interpretation of this provision. With regard to the nature of the rights enshrined in Article 3 the Court stated:

> Where nearly all the other substantive clauses in the Convention and in Protocols Nos. 1, 4, 6 and 7 use the words "Everyone has the right" or "No one shall" Article 3 uses the phrase "The High Contracting Parties undertake". It has sometimes been inferred from this that the article does not give rise to individual rights and freedoms "directly secured to anyone" within the jurisdiction of these Parties (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 91, para. 239), but solely to obligations between states.
>
> [...]
>
> Such a restrictive interpretation does not stand up to scrutiny.
>
> [...]
>
> Accordingly – and those appearing before the Court were agreed on this point – the inter-state colouring of the wording of Article 3 does not reflect any difference of substance from the other substantive clauses in the Convention and Protocols. The reason for it would seem to lie rather in the desire to give greater solemnity to the commitment undertaken and in the fact that the primary obligation in the field concerned is not one of abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the state of positive measures to "hold" democratic elections.

Thus, Article 3, which does not merely protect a right but protects a fundamental right, is one of the rare provisions to impose a positive obligation on the state, although it leaves each state a wide margin of appreciation in the choice of the electoral system adopted. The Court continues:

> The rights in question are not absolute. Since Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations (see, *mutatis mutandis*, the Golder judgment of 21 February 1975, Series A no. 18, pp. 18-19, para. 38).
>
> [...]
>
> Article 3 applies only to the election of the "legislature", or at least of one of its chambers if it has two or more ("*Travaux préparatoires*", vol. VIII, pp. 46, 50 and 52). The word "legislature" does not necessarily mean only the national parliament, however; it has to be interpreted in the light of the constitutional structure of the state in question.
>
> [...]
>
> As regards the method of appointing the "legislature", Article 3 provides only for "free" elections "at reasonable intervals", "by secret ballot" and "under conditions which will ensure the free expression of the opinion of the people". Subject to that, it does not create any "obligation to introduce a specific system" ("*Travaux préparatoires*", vol. VII, pp. 130, 202 and 210, and vol. VIII, p. 14) such as proportional representation or majority voting with one or two ballots.
>
> Here too the Court recognises that the Contracting States have a wide margin of appreciation, given that their legislation on the matter varies from place to place and from time to time.
>
> Electoral systems seek to fulfil objectives which are sometimes scarcely compatible with each other: on the one hand, to reflect fairly faithfully the opinions of the people, and on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will. In these circumstances the phrase "conditions which will ensure the free expression of the opinion of the people in the choice of the legislature" implies essentially – apart from freedom of expression (already protected under Article 10 of the Convention) – the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election.
>
> It does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate "wasted votes".
>
> For the purpose of Article 3 of Protocol No. 1, any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the "free expression of the opinion of the people in the choice of the legislature".

The Gitonas and Others v. Greece case (1 July 1997, Reports of Judgments and Decisions 1997-IV, pp. 1233-1238, paras. 39-40, 44) concerns the disqualification of certain persons from standing for election as members of Parliament. In this case the election of five members of Parliament was annulled. The applicants were disqualified from standing for election because, in accordance with Article 56 of the Greek Constitution, they had held posts in public office for more than three months during the three years preceding the elections:

> The Court reiterates that Article 3 of Protocol No. 1 implies subjective rights to vote and to stand for election. As important as those rights are, they are not, however, absolute. Since Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for "implied limitations" (see the Mathieu-Mohin and Clerfayt v. Belgium judgment of 2 March 1987, Series A no. 113, p. 23, para. 52). In their internal legal orders the Contracting states make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3. They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not

curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (*ibid*. p. 23, para. 52).

More particularly, the states enjoy considerable latitude to establish in their constitutional order rules governing the status of parliamentarians, including criteria for disqualification. Though originating from a common concern - ensuring the independence of members of parliament, but also the electorate's freedom of choice – the criteria vary according to the historical and political factors peculiar to each state. The number of situations provided for in the constitutions and the legislation on elections in many member states of the Council of Europe shows the diversity of possible choice on the subject. None of these criteria should, however, be considered more valid than any other provided that it guarantees the expression of the will of the people through free, fair and regular elections.

The Court notes that paragraph 3 of Article 56 of the Constitution, which was applied in the applicants' case, establishes grounds for disqualification that are both relative and final in that certain categories of holders of public office – including salaried public servants and members of staff of public-law entities and public undertakings – are precluded from standing for election and being elected in any constituency where they have performed their duties for more than three months in the three years preceding the elections; the disqualification will moreover stand notwithstanding a candidate's prior resignation, unlike the position with certain other categories of public servant under paragraph 1 of that article (see paragraph 29 above).

Such disqualification, for which equivalent provisions exist in several member states of the Council of Europe, serves a dual purpose that is essential for the proper functioning and upholding of democratic regimes, namely ensuring that candidates of different political persuasions enjoy equal means of influence (since holders of public office may on occasion have an unfair advantage over other candidates) and protecting the electorate from pressure from such officials who, because of their position, are called upon to take many – and sometimes important – decisions and enjoy substantial prestige in the eyes of the ordinary citizen, whose choice of candidate might be influenced.

[...]

The Court points out that it is primarily for the national authorities, and in particular the courts of first-instance and of appeal, which are specially qualified for the task, to construe and apply domestic law.

It notes that the positions held by the applicants were not among those expressly referred to in Article 56 para. 3. However, that did not guarantee them a right to be elected. The Special Supreme Court has sole jurisdiction under Article 58 of the Constitution (see paragraph 29 above) to decide any dispute over disqualifications and, as in any judicial order where such a system exists, anyone elected in breach of the applicable rules will forfeit his position as a member of Parliament.

In the instant case the Special Supreme Court, after analysing the nature of the posts held by the applicants and the applicable legislation, held that the posts were similar to the ones described in paragraph 3 of Article 56; it further found that the conditions relating to when the position was held, and the duration and extent of the duties, were met in the case of each of the applicants. On reasonable grounds it considered it necessary to annul their election (see paragraphs 10, 14, 18, 22 and 27 above).

The Court cannot reach any other conclusion; there is nothing in the judgments of the Special Supreme Court to suggest that the annulments were contrary to Greek legislation, arbitrary or disproportionate, or thwarted "the free expression of the opinion of the people in the choice of the legislature" (see, *mutatis mutandis*, the aforementioned Mathieu-Mohin and Clerfayt v. Belgium judgment, p. 25, para. 57).

Consequently, there has been no violation of Article 3 of Protocol No. 1.

Protocol No. 4

Article 1 of Protocol No. 4

Article 1 of Protocol No. 4 is worded as follows:

> **No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.**

This article complements Article 5 of the Convention. It refers to the notion of "deprivation of liberty" which was examined under Article 5. It also contains the expression "contractual obligation", which, like a number of other Convention concepts, has an autonomous meaning.

Articles 2, 3 and 4 of Protocol No. 4 concern freedom of movement and the problems associated with expulsion.

Article 2 of Protocol No. 4

Article 2 of Protocol No. 4 reads as follows:

> 1. **Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.**
> 2. **Everyone shall be free to leave any country, including his own.**
> 3. **No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.**
> 4. **The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.**

Article 2 para. 1 of Protocol No. 4

Article 2 para. 1 of Protocol 4 applies above all to aliens lawfully on the territory of a state even though it is formulated in general terms. In the case of A v. San Marino (9 July 1993, DR 75, p. 249, para. 1) the Commission notes that this provision:

> cannot be interpreted as recognising the right of an alien to reside or continue to reside in a country of which he is not a national. Its sole purpose is to guarantee those lawfully resident within the territory of a state, whether they are nationals of that state or not, the freedom to come and go within the territory and the freedom to choose their place of residence there without interference.

The Commission had the opportunity to rule on the notion of "lawful" presence on the territory of a state in the Paramanathan v. the Federal Republic of Germany case (Application No. 12068/86, Decision of 1 December 1986, DR 51, p. 240, para. 1).

> The Commission observes that Article 2 para. 1 of Protocol No. 4 secures the freedom of movement to persons "lawfully within the territory of a state". This condition refers to the domestic law of the state concerned. It is for the domestic law and organs to lay down the conditions which must be fulfilled for a person's presence in the territory to be considered "lawful". The Commission, in this respect, recalls its constant case-law according to which there is no right of an alien to enter, reside or remain in a particular country, as such, guaranteed by the Convention (cf. No. 9214/80, 9473/81 and 9474/81, Dec. 11.5.82, DR 29, p. 176). The Commission is of the opinion that aliens provisionally admitted to a certain district of the territory of a state, pending proceedings to determine whether or not they are entitled to a residence

> permit under the relevant provisions of domestic law, can only be regarded as "lawfully" in the territory as long as they comply with the conditions to which their admission and stay are subjected.

However, the Raimondo v. Italy judgment (22 February 1994, Series A no. 281-A, p. 19, paras. 39, 40) concerned an Italian national whose movement was limited in his own country in the context of a supervision measure (he was suspected of belonging to a Mafia-type criminal association).

> The Court considers in the first place that, notwithstanding the applicant's assertion to the contrary, the measure in issue did not amount to a deprivation of liberty within the meaning of Article 5 para. 1 of the Convention. The mere restrictions on the liberty of movement resulting from special supervision fall to be dealt with under Article 2 of Protocol No. 2 (see the Guzzardi judgment, cited above, p. 33, para. 92).
>
> In view of the threat posed by the mania to "democratic society", the measure was in addition necessary "for the maintenance of *ordre public*" and "for the prevention of crime". It was in particular proportionate to the aim pursued, up to the moment at which the Catanzaro Court of Appeal decided, on 4 July 1986, to revoke it (see paragraph 14 above).
>
> It remains to consider the period between 4 July and 20 December 1986, when the decision was notified to the applicant (see the same paragraph). Even if it is accepted that this decision, taken in private session, could not acquire legal force until it was filed with the registry, the Court finds it hard to understand why there should have been a delay of nearly five months in drafting the grounds for a decision which was immediately enforceable and concerned a fundamental right, namely the applicant's freedom to come and go as he pleased; the latter was moreover not informed of the revocation for eighteen days.
>
> The Court concludes that at least from 2 to 20 December 1986 the interference in issue was neither provided for by law nor necessary. There has accordingly been a violation of Article 2 of Protocol No. 4.

In the case of Piermont v. France (27 April 1995, Series A no. 314) the applicant, a German citizen who was at the material time a member of the European Parliament, maintained that, having entered French Polynesia lawfully, she had the right to liberty of movement there. The applicant had taken part in a public meeting, had joined a demonstration and denounced during the demonstration the continuation of nuclear testing and the French presence in the Pacific, whereas the High Commissioner of the French Republic in French Polynesia had requested her to show some discretion in any comments she made on French internal matters, failing which she risked being expelled. The day after the demonstration – i.e. 2 March 1986 – the High Commissioner made an order expelling the applicant and prohibiting her from re-entering the territory. In its judgment (para. 44):

> The Court notes that the expulsion order of 2 March 1986 was served on Mrs Piermont next day when she had already taken her seat in the aircraft (see paragraph 13 above). The applicant, who was not travelling on business for the European Parliament, had been able to move around Polynesia as she wished from 24 February to 3 March 1986 and during that period had suffered no interference with the exercise of her right to liberty of movement within the meaning of Article 2 of Protocol No. 4.
>
> [...]
>
> Article 5 para. 4 of the Protocol[1] (see paragraph 28 above) requires that Polynesia should be regarded as a separate territory for the purposes of the references in Article 2 to the territory of the state. At all events, the Aliens (Conditions of Entry and Residence) Ordinance 1945 had not been promulgated there (see paragraph 29 above). As a result, once the expulsion order had been served, the applicant was no longer lawfully on Polynesian territory and in those circumstances did not suffer any interference with the exercise of her right to liberty of movement, as secured by the provision in question, at that point either.

After her visit to French Polynesia the applicant went to New Caledonia. The applicant submitted that having entered New Caledonia lawfully, she should have been able to move there freely. According to

1. Article 5 para. 4 of Protocol No. 4 provides: *The territory of any state to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this article, shall be treated as separate territories for the purpose of the references in Article 2 and 3 to the territory of a State.*
   Article 5 para. 1 of Protocol No. 4 provides: *Any High Contracting Party may, at the time of signature or ratification of this Protocol, or at any time thereafter, communicate to the Secretary-General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of this Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.*

the applicant, an expulsion measure had been taken against her that had incorrectly been described as an exclusion. The *Conseil d'État* had described the order as a decision "excluding Mrs Piermont from the territory of New Caledonia".

> In the instant case the Court considers that the applicant's argument that the mere fact of going through immigration control regularises a person's position in a territory is too formalistic. At an airport such as Nouméa's a passenger remains liable to checks for as long as he remains within the perimeter. In this instance Mrs Piermont was stopped just after her passport had been stamped and the impugned order was served on her before she had left the airport, since she was still held in an office under police guard.
>
> The order made by the High Commissioner of the Republic is headed "Order prohibiting an alien from entering the territory" and Article 1 of it embodies that prohibition. The *Conseil d'État* in its decision of 12 May 1989 did not question the nature of the order. That being so, the applicant was never lawfully within the territory, a requirement if Article 2 of Protocol No. 4 is to apply. There has therefore been no breach of that provision.

Article 2 para. 2 of Protocol No. 4

In the case of Peltonen v. Finland (20 February 1995, DR 80-A, p. 43, para. 1) the Commission interpreted the provisions of Article 2 para. 2 of Protocol No. 4. In this case the applicant has permanently resided in Sweden since December 1986. In reply to his request for a ten-year passport at the Finnish Embassy in Stockholm, the Embassy informed the applicant that he could not be issued with a passport, as he had failed to attend the call-up for military service.

> The Commission observes that the refusal to issue the applicant with a Finnish passport has not prevented him from leaving that country, nor is it preventing him from leaving a Nordic country for another Nordic country. Article 2 para. 2 of Protocol No. 4 provides, however, that everyone shall be free to leave "any country", which implies a right to leave for such a country of the person's choice to which he may be admitted. The Commission therefore considers that the passport refusal interfered with this freedom of the applicant. It remains to be examined whether the interference was justified under paragraph 3 of Article 2.

The Commission decided that the refusal to issue the applicant with the requested ten-year passport could reasonably be considered necessary in a democratic society for the purposes of pursuing the legitimate aims of maintaining *ordre public* and ensuring national security.

Article 2 para. 3 of Protocol No. 4

Article 2 para. 3 provides in a clause for a derogation from the rights provided for in Article 2 paragraphs 1 and 2.

It should be recalled that also under Article 2 paragraph 4 the rights set forth in paragraph 1 of this Article can be restricted.

Articles 3 and 4 of Protocol No. 4

Articles 3 and 4 of Protocol No. 4 read as follows:

Article 3

1. **No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the state of which he is a national.**
2. **No one shall be deprived of the right to enter the territory of the state of which he is a national.**

Article 4

Collective expulsion of aliens is prohibited.

Article 3 of Protocol No. 4

Article 3 of Protocol No. 4 ensures that a person is allowed to remain in the country of which he is a national. Article 4 prohibits the collective expulsion of aliens. In connection with the notion of collective expulsion, reference should be made to the A. and Others v. the Netherlands case (Application No. 14209/88, Decision of 16 December 1988, DR 59, p. 277), where the Commission stated:

> The Commission recalls its decision in Application No. 7011/75 (Dec. 3.10.75, Yearbook 19 p. 416, 454) wherein it defined collective expulsion as follows:
>
> " [...] any measure of the competent authorities compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group".

See Protocol No. 7, p. 140 below.

Protocol No. 6 – Abolition of the death penalty

Articles 1 to 4 of Protocol No. 6

Articles 1 to 4 are worded as follows:

Article 1

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2

A state may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The state shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Article 3

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 4

No reservation may be made under Article 64 of the Convention in respect of the provisions of this Protocol.

In the absence of relevant case-law, it must suffice to refer to the study of Article 2 of the Convention (Part 1). See p. 17 and following.

Protocol No. 7

Article 1 of Protocol No. 7

Article 1 of Protocol No. 7 is worded as follows:

> **1. An alien lawfully resident in the territory of a state shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:**
>
> **a. to submit reasons against his expulsion;**
>
> **b. to have his case reviewed; and**
>
> **c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.**
>
> **2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.**

In the case of Voulfovitch and Oulianova v. Sweden (13 January 1993, DR 74, p. 209, para. 3) the Commission interpreted the term "lawfully resident".

> In the context of an instrument which, like the Convention, does not guarantee a right to asylum or other residence authorisation, the term "lawfully resident" used in Article 1 of Protocol No. 7 must be interpreted to refer basically to lawfulness of the presence according to national law. Thus an alien whose visa or residence permit has expired cannot, at least normally, be regarded as being "lawfully resident" in the country.
>
> Whatever the exact scope of the term "lawfully resident", it clearly does not comprise aliens in the applicant's situation. The applicants only had a transit visa for a one-day visit to Sweden and have remained, after the expiry of the visa, in the country solely in order to await, first, a decision on their request for political asylum or residence permit and, subsequently, the enforcement of the expulsion order.

Articles 2, 3 and 4 of Protocol No. 7

Articles 2, 3 and 4 of Protocol No. 7 contain procedural provisions concerning criminal matters which complement the requirements of Article 6 of the Convention. They enshrine the principle of an appeal, the principle of compensation in the event of error by the courts and the principle *ne bis in idem*.

Article 2 of Protocol No. 7

Article 2 is worded as follows:

> **1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.**
>
> **2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.**

Article 2 para. 1 of Protocol No. 7

In the case of Ekbatani v. Sweden (26 May 1988, Series A no. 134, p. 13, para. 26) the Court held:

> Taking both Articles into account – i.e. Article 7 of Protocol No. 7 and Article 60 of the Convention – the Court can find no warrant for the view that the addition of this protocol was intended to limit, at the appellate level. the scope of the guarantees contained in Article 6 of the Convention.

In the case of Borrelli v. Switzerland (2 September 1993, DR 75, p. 152, para. 3), the Commission stated:

> The Commission has just found that the proceedings instituted against the applicant did not constitute the "determination of [... a] criminal charge against him" within the meaning of Article 6 para. 1 of the Convention. The Commission considers that for the same reasons it cannot be said that the applicant was "convicted of a criminal offence" within the meaning of Article 2 of Protocol No. 7. This provision was therefore also not applicable to the proceedings instituted against the applicant.

In the case of Näss v. Sweden (6 April 1994, DR 77-A, p. 40, para. 2) the applicant complained that he was deprived of his right to have his conviction reviewed by a higher tribunal in so far as he was convicted by the Court of Appeal as his request for leave to appeal to the Supreme Court was refused.

> The Commission notes that different rules govern review by a higher tribunal in the various member states of the Council of Europe. In some member states, like Sweden, a person wishing to appeal to the highest tribunal must apply for leave to appeal. The Commission considers that the procedure on the right to apply to the Supreme Court in the present case is in itself to be regarded as a review within the meaning of Article 2 of Protocol No. 7.

Article 2 para. 2 of Protocol No. 7

In the case of Putz v. Austria (3 December 1993, DR 76-A, p. 61, para. 2) a fine of 5 000 Austrian schillings was imposed upon the applicant for an "offence against the order in court", in view of insulting remarks towards the court in his submissions.

> The Commission, assuming that the above court decisions imposing fines upon the applicant for "offences against the order in court" related to a criminal offence within the meaning of Article 2 of Protocol No. 7, had regard to paragraph 2 of this provision, which subjects the right to review by a higher tribunal to "exceptions in regard to offences of a minor character, as prescribed by law".
>
> [...]
>
> The Commission finds that an "offence against the order in court" within the meaning of the Austrian Court Organisation Act, in conjunction with the Code of Civil Procedure, and the Code of Criminal Procedure respectively, constitutes a less serious offence both as to its nature and to the severity of the punishment involved. The Commission therefore considers that an "offence against the order in court" as being of a minor character. The exception to the right to a review by a higher tribunal, pursuant to Article 2 para. 2 of Protocol No. 7, thus applies.

As regards the notion "criminal offence" a reference should be made to the Ravnsborg v. Sweden judgment (23 March 1994, Series A no. 283-B, mentioned above under Article 6 para. 1; the notion of "criminal charge".

Article 3 of Protocol No. 7

Article 3 is worded as follows:

> **When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the state concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.**

No relevant case-law has yet been published as regards Article 3 of Protocol No. 7.

Article 4 of Protocol No. 7

Article 4 is worded as follows:

> **1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state.**
>
> **2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the state concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.**
>
> **3. No derogation from this article shall be made under Article 15 of the Convention.**

The scope of Article 4

In the case of Baragiola v. Switzerland (21 October 1993, DR 75, p. 127, para. 3) the Commission stated:

> it is clear from the express terms of this provision, that it upholds the "*ne bis in idem*" principle only in respect of cases where a person has been tried or punished twice for the same offence by the courts of a single state. But the applicant was first convicted in Italy, whereas the second conviction, in respect of the same acts, was pronounced by a Swiss court.

Applicability *ratione temporis* of Article 4

In the Gradinger v. Austria case (23 October 1995, Series A no. 328-C, para. 53) the Court ruled upon the applicability *ratione temporis* of this provision. It indicates that Article 4 is applicable if the new proceedings are *concluded* after the entry into force of the protocol. The date on which these proceedings were begun is irrelevant. Protocol No. 7 entered into force for Austria on 1 November 1988. The facts are set out below.

> Like the Commission, the Court observes that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision. That provision does not therefore apply before new proceedings have been opened. In the present case, inasmuch the new proceedings reached their conclusion in a decision later in date then the entry into force of Protocol No. 7, namely the Administrative Court's judgment of 29 March 1989, the conditions. for applicability *ratione temporis* are satisfied.

Compliance with Article 4

The applicant caused, while driving a car, an accident which led to the death of a cyclist. The applicant was convicted on 15 May 1987 by the criminal judge of causing death by negligence and sentenced to 200 day-fines of 160 Austrian schillings with 100 days' imprisonment in default of payment pursuant to the Criminal Code. He was acquitted for driving under the influence of alcohol which exceeded the prescribed limit. The district authority issued on 16 July 1987 for the same conduct a sentence order imposing a fine of 12 000 schillings on the applicant for driving under the influence of alcohol, with two weeks' imprisonment in default pursuant to the Road Traffic Act. Unlike the criminal judge the district authority found that the blood alcohol level exceeded the prescribed limit. This – administrative – procedure ended with the judgment of the Administrative Court of 29 March 1989.

> The Court notes that, according to the St Pölten Regional Court, the aggravating circumstance referred to in Article 81 para. 2 of the Criminal Code, namely a blood alcohol level of 0.8 grams per litre or higher, was not made out with regard to the applicant. On the other hand, the administrative authorities found, in order to bring the applicant's case within the ambit of section 5 of the Road Traffic Act, that that alcohol level had been attained. The Court is fully aware that the provisions in question differ not only as regards

the designation of the offences but also, more importantly, as regards their nature and purpose. It further observes that the offence provided for in section 5 of the Road Traffic Act represents only one aspect of the offence punished under Article 81 para. 2 of the Criminal Code. Nevertheless, both impugned decisions were based on the same conduct. Accordingly, there has been a breach of Article 4 of Protocol No. 7 (*ibid*., para. 55).

Article 5 of Protocol No. 7

Article 5 of Protocol No. 7 is worded as follows:

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent States from taking such measures as are necessary in the interests of the children.

As regards this provision, a reference should be made to Articles 8 and 14 of the Convention, which were examined in Part 1. In the Burghartz v. Switzerland judgment of 22 February 1994, Series A no. 280-B, p. 28, para. 23, the Court points out that:

under Article 7 of Protocol No. 7 Article 5 is to be regarded as an addition to the Convention, including Articles 8 and 60. Consequently, it cannot replace Article 8 or reduce its scope (see, *mutatis mutandis*, the Ekbatani v. Sweden judgment of 26 May 1988, Series A no. 134, pp. 12-13, para. 26).

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