SURVEY

INTERNATIONAL ADJUDICATION OF HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS: A SURVEY OF ITS PROCEDURAL AND SOME OF ITS SUBSTANTIVE HOLDINGS

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I. Introduction

In the aftermath of World War II, vigorous attempts were made to protect human rights. In those endeavors the development of a trend can be seen, proceeding from the mere formulation of general principles to international, genuinely judicial adjudication of viola-

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tions of individual human rights and even to the condemnation of states to provide material indemnification to the victims of such violations. The Charter of the United Nations provided the initial principles for protecting human rights. First, its Preamble declares that one of its aims is “to reaffirm faith in fundamental human rights.” In addition, the Charter states that one of its purposes is “[t]o achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms . . . .” Moreover, members of the United Nations pledge to cooperate for the achievement of “universal respect for, and observance of, human rights and fundamental freedoms . . . .” Finally, the Economic and Social Council is commanded to establish a commission “for the promotion of human rights.”

As a result of this command the Commission on Human Rights was created. This Commission brought forth the Universal Declaration of Human Rights, adopted by the General Assembly on December 10, 1948, with no negative votes and only eight abstentions. The Universal Declaration lists the basic human rights. Yet, like the above mentioned principles in the Charter, this list does not become the internal law of the Member States; instead, it only indicates the aims to be followed by them. This result is evident from the language in the preamble to the Universal Declaration:

The General Assembly [p]roclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms . . . .

This initial stage of defining human rights in terms of general guiding principles was followed by the development of international covenants on human rights, which would become binding on those States that ratified or acceded to them. On December 16, 1966, the General Assembly adopted the International Covenant on Economic, Social and Cultural Rights and the International Coven-

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1 U.N. Charter art. 1, para. 3.
2 Id., art. 55, para c, art. 56.
3 Id. art. 68.
nant on Civil and Political Rights. Both covenants provide for implementation in varying degrees that would become binding upon the States Parties.

The extent of this implementation in the Economic, Social and Cultural Rights Covenant is quite modest. The States Parties are to submit reports to the Secretary General of the United Nations for transmittal to the Economic and Social Council "on the measures which they have adopted and the progress made in achieving the observance of the rights recognized . . ." in the Covenant. These reports are to be furnished in stages under a program established by the Economic and Social Council. Then, based upon a system of consultation among the Council, the States Parties, the Specialized Agencies and the Commission on Human Rights, the Economic and Social Council "may submit from time to time to the General Assembly reports with recommendations of a general nature. . . ." These implementation procedures, of course, do not amount to judicial enforcement or even to administrative supervision of specific violations.

The degree of implementation is somewhat stronger in the Civil and Political Rights Covenant. Like the Economic, Social and Cultural Rights Convenant, the Civil and Political Rights Covenant requires the States Parties to "submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights . . ." But unlike the reports under the Economic, Social and Cultural Rights Covenant, which are transmitted to the Economic and Social Council, the reports under the Civil and Political Rights Covenant are transmitted to the Human Rights Committee (hereinafter referred to as the Committee). The Committee, in turn, is to study the

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7 Economic, Social and Cultural Rights Covenant, supra note 5, art. 16, para. 1.
8 Id. art. 17, para. 1.
9 Id. arts. 18-22.
10 Id. art. 21 (emphasis added).
12 Civil and Political Rights Covenant, art. 40, para. 1.
13 Id. arts. 28-39. The Committee is a body consisting of eighteen members, established and defined in the above cited articles.
reports and transmit them with any appropriate comments to the States Parties. It may also transmit both comments and reports to the Economic and Social Council.\footnote{Id. art. 40, para. 4.} In addition, the Committee has the role of a fact finding body to "consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant."\footnote{Id. art. 41, para. 1.} This role, however, is restricted to only those findings between States Parties which have recognized the competence of the Committee to deal with such claims.\footnote{Id.} Moreover, States Parties may also sign the Optional Protocol to the International Covenant on Civil and Political Rights of December 16, 1966,\footnote{G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) 59, U.N. Doc. A/6316 (1966) [hereinafter cited as Protocol].} in which

[a] State Party that has become a Party to the Protocol . . . recognizes the competence of the Committee to receive and consider communications from individuals subject to the jurisdiction who claim to be victims of a violation by a State Party that also is a Party to the Protocol of any of the rights set forth in the Covenant.\footnote{Id. art. 1.}

Finally, if its fact finding does not lead to a resolution satisfactory to the concerned States Parties, the Committee may, with the prior consent of the States Parties, appoint an ad hoc Conciliation Commission, whose good offices "shall be made available to the States Parties concerned . . . ."\footnote{Civil and Political Rights Covenant, supra note 6, art. 42, para. 1.} Like the Economic, Social and Cultural Rights Covenant, the Civil and Political Rights Covenant came into force three months after thirty-five State Parties ratified or acceded to it.\footnote{Id. art. 49. This occurred on March 23, 1976.} In addition at least ten State Parties must have declared that they recognize the competence of the Committee as a fact finding body,\footnote{Id. art. 41, para. 2; Schwelb, supra note 11, at 512.} and at least ten must have ratified the Protocol before any Committee procedure can be implemented.\footnote{Protocol, supra note 17, art. 9; the optional Protocol to the Convention came into force at the same time the Convention did, since by then 12 countries had ratified it [ten were needed]. Schwelb, supra note 11, at 512.}

Even when both Covenants and the Protocol are in force there will
still be no actual international, judicial procedure under them. In order to understand this lack of adjudicatory power, however, one must consider the enormous difficulties involved in harmonizing the diverse political and philosophical attitudes concerning human rights found in the more than a hundred States Members of the United Nations. Thus, in order to obtain the necessary ratifications, the draftsmen of both Covenants had to dilute the strength of the enforcement procedures.

This explanation applies equally to the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly of the United Nations on December 21, 1965. Its implementation procedures are similar to those of the Civil and Political Rights Convenant, and it entered into force on January 4, 1969, after receiving the requisite 27 ratifications or accessions.

II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS IMPLEMENTATION

The diversity of philosophical and political attitudes regarding civil and political rights was less pronounced among the nations of Western Europe than among those in the United Nations. The common experience of total suppression of the individual under the Hitler regime and the observation of the developments in neighboring Communist countries made it easier and more compelling to cooperate in strengthening the protection of human rights, especially in the field of civil and political rights. Thus, in Rome, on November 4, 1950, less than two years after the adoption of the Universal Declaration of Human Rights by the United Nations, the members of the Council of Europe adopted the Convention for the Protection of Human Rights and Fundamental Freedoms, which dealt with civil and political rights. After ten instruments of ratification, it entered into force on September 3, 1953. The Convention has been supplemented or amended in five Protocols, all of

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24 Id. art. 19.
26 Id. art. 66, para. 2.
which are now in force, the latest having come into force on December 20, 1971.\textsuperscript{28}

The most significant aspect of the Convention lies in its implementation procedures for adjudication\textsuperscript{29} through the European Court of Human Rights (hereinafter referred to as the Court).\textsuperscript{30} Besides the Court, the Convention creates another organ for implementation, the European Commission on Human Rights (hereinafter referred to as the Commission).\textsuperscript{31} In addition to establishing some procedural provisions for each organ,\textsuperscript{32} the Convention also directs each one to draw up its own rules of procedure,\textsuperscript{33} which has been done.\textsuperscript{34} A third organ, the Committee of Ministers of the Council of Europe,\textsuperscript{35} is also involved in implementing the procedures of the Convention.

In order to facilitate an understanding of some of the procedural decisions of the Court, the following outline of implementation provisions of the Convention is provided. The members of the Commission consist of one national from each High Contracting Party, who sits in his individual capacity, not as a representative of his country.\textsuperscript{36} Each member is elected by an absolute majority of the Committee of Ministers\textsuperscript{37} for a period of six years.\textsuperscript{38} Any High Contract-

\begin{itemize}
\item \textsuperscript{28} Protocol No. 1, \textit{done} March 20, 1952, 213 U.N.T.S. 262, Europ. T.S. No. 9 (added to the protection of the right of peaceful enjoyment of one's possessions and the right to education; established the duty of the High Contracting Parties to hold free elections); Protocol No. 2, \textit{done} May 6, 1963, Europ. T.S. No. 44. (conferring upon the European Court of Human Rights competence to give advisory opinions); Protocol No. 3, \textit{done} May 6, 1963, Europ. T.S. No. 45 (amending arts. 29, 30 and 34 of the Convention); Protocol No. 4, \textit{done} Sept. 16, 1963, Europ. T.S. No. 46 (securing right to free movement and choice of residence; prohibition of exile, collective expulsion of aliens and imprisonment for civil debts); Protocol No. 5, \textit{done} Jan. 20, 1966, Europ. T.S. No. 55 (amending arts. 22 and 40 of the Convention).
\item \textsuperscript{29} \textit{Convention, supra} note 25, arts. 19-57.
\item \textsuperscript{30} \textit{Id.} art. 19, para. 2.
\item \textsuperscript{31} \textit{Id.} art. 19, para. 1.
\item \textsuperscript{32} \textit{Id.} art. 20-56.
\item \textsuperscript{33} \textit{Id.} art. 36: "The Commission shall draw up its own rules of procedure;" art. 55: "The Court shall draw up its own rules and shall determine its own procedure."
\item \textsuperscript{35} \textit{Id.} note 25, arts. 31, 32, 54.
\item \textsuperscript{36} \textit{Id.} arts. 20, 23.
\item \textsuperscript{37} \textit{Id.} art. 21.
\item \textsuperscript{38} \textit{Id.} art. 22, para. 1.
\end{itemize}
The Commission may also receive petitions "from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights" established in the Convention if the accused High Contracting Party has consented to the Commission receiving such petition, provided that at least six High Contracting Parties have recognized this competence. There are a mixture of substantive and procedural restrictions imposed upon the Commission. It may not deal with any violation until all domestic remedies have been exhausted and, "according to the generally recognized rules of international law," even then, it has only six months from the date of the final decision to deal with it. In addition, if it receives a petition from an individual person, the Commission shall not deal with it if that petition is anonymous, substantially similar to a matter already examined by the Commission or already submitted to another international body, incompatible with the Convention, manifestly ill-founded, or abusive of the right of petition. If the Commission rejects the individual's petition after it has already accepted it, it must do so by a unanimous vote, while otherwise it decides by a majority of the members present and voting.

After a petition is considered, if the Commission effects a friendly settlement, it sends a brief report of the facts and solution to the Committee of Ministers of the Council of Europe and to its Secretary General for publication. If no solution is reached, however, the Commission sends a report of the facts, its opinion whether a breach occurred, and any proposals for a solution to the Committee of Ministers and to the States concerned, who are not at liberty to publish it. If the Commission does not reach a solution, there are

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39 Id. art. 24.
40 Id. art. 25, para. 1.
41 Id. art. 25, para. 4.
42 Id. art. 26.
43 Id. art. 27.
44 Id. arts. 29, 34 as amended. A quorum of the Commission consists of nine members; in some cases, only seven are sufficient when considering individual petitions. Rule 25, Rules of Procedure, [1955-1957] Y.B. EUR. CONV. ON HUMAN RIGHTS 68 (Eur. Comm. on Human Rights).
45 Id. art. 30.
46 Id. art. 31.
two methods to achieve a binding decision on the merits of the case. The first method involves the Committee of Ministers. "[T]he Committee of Ministers shall decide by a majority of two-thirds of the members entitled to sit on the Committee whether there has been a violation of the Convention." If the Committee of Ministers finds there was a violation, it gives the violating High Contracting Party a period within which it must comply with the Committee's decision as to the measures to be taken. "If the High Contracting Party . . . has not taken satisfactory measures within the prescribed period, the Committee of Ministers shall decide by the majority . . . what effect shall be given to its original decision and shall publish the Report." The High Contracting Parties undertake as binding on them the decisions made by the Committee of Ministers. This method may be characterized as quasijudicial; it is not a real judicial proceeding since the Committee of Ministers does not consist of independent judges. Rather, it consists of the Ministers of Foreign Affairs or alternatively other members of the governments which form the Council of Europe. Thus, the members of the Committee act as representatives of their respective governments, not as independent individuals.

The second method of achieving a binding decision if the Commission does not reach a solution involves the European Court of Human Rights. This method is clearly judicial. The very use of the word "court" and the denomination of its members as "judges" emphasizes this point. Perhaps it is for this reason that the framers of the Convention thought it unnecessary to repeat what is expressly provided for the members of the Commission, i.e., that the judges should "sit in their individual capacity." This notion of the independence of the judges is further reinforced by Rule Four of the Rules of Court: "A judge may not exercise his functions while he is a member of a Government or while he holds a post or exercises a profession which is likely to affect confidence in his independence." The Court is composed of the number of judges equal to the number

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41 Id. art. 32, para. 1.
42 Id. art. 32, para. 2.
43 Id. art. 32, para. 3.
44 Id. art. 32, para. 4.
52 Convention, supra note 25, arts. 38-56.
53 Id. art. 23.
of members on the Council of Europe. A no two judges may be nationals of the same State. A quorum consists of eleven judges. Individual cases are considered by a Chamber consisting of seven judges. Where a serious question about the interpretation of the Convention arises, however, “the Chamber may . . . relinquish jurisdiction in favor of the plenary Court.” Since the Chamber must always sit with the full number of seven judges, it has no problem as to quorum. Both the Chamber and the plenary Court reach decisions by a majority of the judges sitting.

Using language very similar to that in the Statute of the International Court of Justice, the Convention requires that judges “be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.” The Court was to be established after eight High Contracting Parties declared recognition “as compulsory ipso facto and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.” The Court has jurisdiction only after the High Contracting Parties concerned in the case have made such a declaration or have consented to the Court’s jurisdiction in a particular case. “The Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement and within the period of three months provided for in Article 32.” The proceedings before the Committee of Ministers and before the Court are exclusive of each other. Only the Commission and a High Contracting Party have the right to bring a case before the Court. Thus, there is no provision which allows individ-

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54 Id. art. 38.
55 Id.
57 Convention, supra note 25, art. 43.
58 Rules of Court, supra note 56, rule 48, para. 1.
59 Id. rules 21 and 22.
60 Id. rule 20, para. 1. The requirement of a fixed number of judges corresponds to the general European practice for courts of more than one judge.
61 Convention, supra note 25, art. 39, para. 3.
63 Id. art. 48.
64 Id. art. 47.
65 When a national of a High Contracting Party is alleged to be a victim, a High Contract-
uals or nongovernmental organizations to bring a case before the Court, as there is for bringing a petition to the Commission. If the Court finds a violation of the Convention by a judicial or other authority of a High Contracting Party "and if the internal law of the said Party allows only partial reparation . . . the decision of the Court shall . . . afford just satisfaction to the injured party." Like the rule pertaining to decisions by the Committee of Ministers, "[t]he High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties," and the Committee of Ministers shall supervise its execution.

A comparison of these two methods of achieving a binding decision reveals that the first, the quasijudicial activity of the Committee of Ministers, is but a necessary followup to the work of the Commission. The second method, the proceedings before the Court which takes place only upon express demand by the Commission or any concerned High Contracting Party, seems to have some characteristics of an appeal even though it can be initiated by the Commission itself.

The speed with which the Council of Europe responded to the civil and political rights portion of the Universal Declaration of Human Rights could not be applied to that Declaration's economic, social and cultural rights portion. Nevertheless, on October 18, 1961, in Turin, Italy, the Council of Europe signed the European Social Charter which covered these rights—more than 5 years before the Economic, Social and Cultural Rights Covenant was established. Reflecting the difficulty of harmonizing the attitudes of the signing States, Part I of the European Social Charter is little more than a declaration of aims which it will pursue by all appro-
edge certain rights. A very mild degree of implementation is provided in Part IV. It establishes a duty to make reports concerning accepted provisions as well as those provisions which are not accepted. In addition, Part IV establishes a procedure for examination and evaluation of these reports by a Committee of Experts, a Subcommittee of the Governmental Social Committee of the Council of Europe, and the Consultative Assembly, which is the parliamentary branch of the Council of Europe. On the basis of the views of the Subcommittee and the Consultative Assembly, the Committee of Ministers may "[b]y a majority of two-thirds of the members . . . make to each Contracting Party any necessary recommendations." This mild form of censure and the publicity resulting from the procedure of handling the reports are the only means of enforcement provided in the European Social Charter, which came into force on February 26, 1965, after the fifth ratification.

A comparison between the implementation procedures in the Economic, Social and Cultural Rights Covenant and the Civil and Political Rights Covenant and those in the European Social Charter and the Convention reveal the greater strength of the latter. Even the Human Rights Committee provided for in the Civil and Political Rights Covenant has fewer powers than the European Commission on Human Rights. If no solution is reached, the Human Rights Committee can merely submit a brief statement of facts to the States Parties concerned and, with the prior consent of these Parties, appoint an ad hoc Conciliation Commission. On the other hand, the European Commission on Human Rights can draw up a report on the facts and state its opinion as to whether a violation of the Convention has occurred. Finally, there is no counterpart in the United Nations covenants to the functions of either the Committee of Ministers or the European Court of Human Rights.
The European Convention has, to a certain extent, served as a model for the American Convention on Human Rights promoted by the Organization of American States and signed at San José, Costa Rica on November 22, 1969. It has not yet come into force. Like the European Convention, the American Convention provides for a Commission on Human Rights and Court of Human Rights. The powers of the Inter-American Commission on Human Rights, whose members, like those of the European Commission, sit in their individual capacity, appear to be broader than those of its European counterpart. If a solution is not reached, each Commission can draw up a report stating the facts and the conclusion as to whether there was a violation of protected rights. The substantive function of the European Commission ends with this procedure, reserving any future action for the Committee of Ministers or the Court. The Inter-American Commission, however, may, by a majority vote, set forth its opinions and conclusions regarding the question under consideration, if, within 3 months after its report, the question has not been settled or submitted to the Inter-American Court of Human Rights. Where appropriate the Inter-American Commission shall also make pertinent recommendations and prescribe a period within which the situation is to be remedied. After the expiration of this prescribed period, it decides whether the State concerned has implemented adequate corrective measures and whether it should publish its report. Whether this procedure amounts to an actual decision of the case by the Inter-American Commission, however, is doubtful. Although it shall "decide" whether the State has taken adequate mea-

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Parties to the Convention which are also Parties to the United Nations Covenant on Civil and Political Rights and have recognized the jurisdiction of the United Nations Human Rights Committee "should normally utilise (sic) only the procedure established by the European Convention in respect of complaints against another Contracting Party to the European Convention relating to an alleged violation of a right which in substance is covered both by the European Convention (or its Protocols) and by the UN (sic) Covenant on Civil and Political Rights, it being understood that the UN (sic) procedure may be invoked in relation to rights not guaranteed in the European Convention (or its protocols) or in relation to States which are not Parties to the European Convention." Resolution (70) 17, COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 904 (9th ed. 1974) [hereinafter cited as COLLECTED TEXTS].

80 Id. arts. 34-51.
81 Id. arts. 52-69.
82 Id. art. 36, para. 1.
83 Id. art. 35.
sures, the Inter-American Commission may only set forth its "opinion and conclusions" about the question submitted to it.

There is also a permanent Arab Regional Commission on Human Rights which was created by the Council of the Arab League on September 3, 1968. Its Rules of Procedure do not indicate that this Commission has any decision making power regarding specific human rights violations. Rather, as Article 12 states, "[t]he Commission's duties ... are preparatory, being submitted as draft agreements to the League Council. The Commission may submit its researches, recommendations and suggestions to the Council." Moreover, each member of this Commission is a representative of the State appointing him, and, thus, does not act as an independent person in his individual capacity. In short, this Commission does not even possess a quasijudicial quality.

The preceding survey reveals that, at present, the European Court of Human Rights is the only truly functioning, international judicial organ, established by international agreement, with the power to adjudicate violations of internationally guaranteed human rights. Thus, it should be of interest to learn how the Court's decisions have answered some of the procedural and some of the substantive questions regarding its judicial functions.

III. THE DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

A. Lawless Case

The first case before the Court called upon it to make a decision regarding the validity of one of the Commission's Rules of Procedure. Gerard Richard Lawless, a national of the Republic of Ireland, alleged in a petition lodged with the Commission on November 8, 1957, that the authorities in Ireland had violated the Convention because he was detained without trial from July 13 to December 11, 1957, in a military detention camp under an order of the

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84 A. Robertson, Human Rights in the World 145, n.10.
85 Rules of Procedure of the Permanent Arab Commission on Human Rights, reprinted in A. Robertson, note 84 supra, at 274.
86 Id. art. 12.
87 Id. arts. 2, 3.
Minister of Justice, based upon the Offences Against the State Act of 1940. He claimed a violation of Articles 5 and 6 of the Convention which protect the liberty of everyone. He denied that there existed a public emergency threatening the existence of Ireland or that his detention was strictly required by the exigencies of the situation. He asserted that in any case the Irish Government had not fully informed the Secretary General of the Council of Europe of the measures which it had taken as prescribed in Article 15 of the Convention, and of the reasons thereof when it derogated from Articles 5 and 6. He asked for an immediate release from detention, for payment of compensation and damages for his detention and for payment of all costs and expenses of the proceedings in the Irish courts and before the Commission. He maintained the requests for payment after he was released from detention. The Commission unanimously concluded after failure of attempts at a friendly settlement that basically the detention was in violation of Article 5 of the Convention, but, by divided opinions, that there existed a public emergency threatening the existence of Ireland and that the detention was strictly required by the exigencies of the situation; therefore, a valid derogation from Article 5 of the Convention existed and the Convention was not violated. On December 19, 1959, the Commission drew up the Report required by Article 31 of the Convention holding that there was no breach of the Convention and that no action should be taken on the applicant’s request for payments. The Report was sent to the Committee of Ministers on February 1, 1960, and on April 13, 1960, the Commission referred the case to the Court due to the fundamental importance of the questions raised. In conformity with Rule 76 of its Rules of Procedure, the Commission transmitted its Report to the applicant on April 13, 1960, and in-

90 Id. at 47, 56, 57.
92 On March 30, 1960, the Commission adopted Rule 76 of its Rules of Procedure, reading: When a case brought before the Commission in pursuance of Article 25 of the Convention is subsequently referred to the Court, the Secretary of the Commission shall immediately notify the applicant. Unless the Commission shall otherwise decide, the Secretary shall also in due course communicate to him the Commission’s Report, informing him that he may, within a time-limit fixed by the President, submit to the Commission his written observations on the said Report. The Commission shall decide what action, if any, shall be taken in respect of those observations.

Collected Texts, supra note 78, at 319.
vited him to submit his observations to the Commission, pointing out to him that that document must be kept secret and that the applicant was not entitled to publish it. At the first hearing of the case on October 3 and 4, 1960, the Court confined its debate to preliminary objections and questions of procedure brought forward by the Commission and the Irish Government in their Memorial and Counter Memorial.

The Court, in its judgment of November 14, 1960 ("Preliminary Objections and Questions of Procedure"), found three points at issue: (1) Is Rule 76 in general contrary to the Convention? (2) Could the Commission, after bringing the case before the Court, communicate its Report to the applicant without violating the Convention? and (3) Should the Court, either at the instance of the Commission acting on its own authority, or through the Commission after authorization by the Court, receive the applicant's observations on the Report or on points arising during the proceedings?

As to point (1) the Court emphasized that a general decision on the compatibility of Rule 76 with the Convention was necessary. It spelled out the functions of the Commission to carry out an indepen-
dent inquiry, to seek a friendly settlement, and, if necessary, to bring the case before the Court. Once this has been done, its function then becomes to assist the Court, its action even at this stage being determined not by its own decision but by the Convention itself. It concluded from the whole body of the rules governing the Court that it could not interpret the Convention in an abstract manner, but only in relation to specific cases referred to it and, according to Article 53 of the Convention, concluded that only the High Contracting Parties, parties to the case, are bound by its decisions. The Court considered itself not competent to make decisions such as deletion of a Rule from the Commission's Rules of Procedure, which would affect all parties to the Convention and would amount to having the power to make rulings on matters of procedure or to render advisory opinions. The Court declared itself without power to consider a point raised in a general manner and rejected the objections by the Irish Government relating to the procedure.6

As to point (2) the Irish Government argued that Article 31 forbade the States concerned to publish the Commission's Report and that this also referred to the report of Committee of Ministers unless the States concerned did not comply with the Committee's decision.7 The Court, however, followed the general reasoning of the Commission that the Contracting States, subject to the express provisions of the Convention, had conferred upon the Commission the necessary powers to fulfill the functions entrusted to it; it emphasized the differences of the nature of the proceedings before the Commission or before the Committee of Ministers as contrasted with those before the Court, the latter ones not being in camera but of a judicial character which in a democratic society called for public proceedings as established as a general principle in Article 18 of the Convention. It concluded that not even Rule 52 of the Rules of Court, under which documents other than the debates and judgment can be published only after special authorization by the Court,8 would prevent the communication of the documents of the

6 Id. at 11, 16.
7 Therefore, to allow the Commission to publish its Report or to communicate it to anybody would put the Contracting Parties to the Convention in a position subordinate to that of the Commission. Individuals, under the Convention, had no part in the proceedings either before the Committee of Ministers or before the Court and dropped out of the proceedings completely once the Commission had adopted its Report. Id. at 12.
8 Rule 52 of the Rules of Court read at the time of the preliminary Judgment in the Lawless Case of November 14, 1960: "The Registrar shall be responsible for the publication of judg-
case to the persons or bodies directly concerned, with the proviso, made either by the Commission or one of the Parties, that they should not be published. The Court therefore decided that the Commission, in communicating its Report to Lawless, did not exceed its powers.99

As to point (3) the Commission invoked precedents from the advisory opinion procedure at the Permanent Court of International Justice and the International Court of Justice where observations of individuals submitted by international organizations that applied for advisory opinions have been taken into consideration, although States alone could be represented in Court. It also referred to the English version of Article 44 of the Convention ("Only the High Contracting Parties and the Commission shall have the right to bring the case before the Court") as compared with the French text ("Seules les Hautes Parties Contractants et la Commission ont qualité pour se présenter devant la Court") in order to show that the authors of the Convention did not intend to dissociate entirely from the proceedings before the Court the individual who had applied to the Commission, but simply to prevent him from bringing a case to the Court himself. The Irish Government thought that the French version of Article 44 allowing only the High Contracting Parties and the Commission to appear before the Court excluded any agreement by the Court to receive the applicant's observations. It also thought that receiving the applicant's observation as a Commission document would impair the Commission's impartiality and would give an individual the opportunity to use the proceedings as a means of attack against his own government.100

The Court distinguished the international cases cited by the Commission on the basis that in none of them had an individual appealed against the action of his own government. Accepting both versions of Article 44 the Court thought that nevertheless it had to safeguard the interests of the individual who might not be a party

—\footnotesize{ments and of such other decisions and documents, whose publication may have been authorized by the Court," [1958-1959] Y.B. EUR. CONV. ON HUMAN RIGHTS 4, 42 (Eur. Comm. on Human Rights). A much larger duty of the Registrar to publish or make accessible to the public material brought before the Court was established in an amendment of October 24, 1961, that reworded Rule 52. It made a restriction of this duty dependent on an express decision by the President of the Court. COLLECTED TEXTS, supra note 78, at 421-22.}


—\footnotesize{Id. at 14, 15.}
to any Court proceedings since the whole of the proceedings are upon issues which concern the applicant; the Court should, therefore, have knowledge of and take into consideration the applicant's point of view. It emphasized that in this regard it had at its disposal the Commission's Report which in defending the public interest would make known the applicant's views even if it did not share them; that the Court could, under Rule 38 of the Rules of Court 101 hear the applicant and invite the Commission, ex officio or authorize it at its request, to submit the applicant's observations. The Court concluded that, though recognizing these possibilities at the preliminary stage of the proceedings where the merits of the case had not been considered, it had no reason to authorize the Commission to transmit to it the applicant's written observations on the Commission's Report 102.

One Judge dissented, 103 believing that the Commission's jurisdiction as a body responsible for ascertaining the facts and drawing up a Report ceases with the transmission of the Report to the Committee of Ministers and that therefore the provision of Rule 76 of the Rules of the Commission violates the Convention and that the Court though not declaring Rule 76 void (which it has no power to do) must refuse to apply any Rule that is contrary to the Convention. He saw only one way to acquaint the applicant with the contents of the Report, that is, the Registrar of the Court could invite him to read it in his presence; if he wished to make any observations on it, the Court alone would have power to decide about this.

It appears that the judgment of the majority better protects the aims of the Convention. The Convention does not prohibit a simple and restricted communication of the Commission's Report to the applicant, the individual most concerned with it. The Court's deci-

101 Rule 38(1) of the Rules of Court reads: "The Chamber may, at the request of a Party or of delegates of the Commission or propriomotu, decide to hear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in the carrying out of its task." COLLECTED TEXTS, supra note 78, at 416.

102 Lawless Case, [1961] 1 Eur. Ct. Human Rights 15-16. The Court reiterated its position in a judgment of April 7, 1961. It refused to consider at the preliminary stage of the proceedings written observations by the applicant contained in a statement of the Commission to the Court of December 16, 1960, but stated that the Commission had full latitude in its debates to take the applicant's views into account for the enlightenment of the Court and for this purpose also to invite the applicant to place some person at its disposal to give assistance to the Delegates of the Commission without this person gaining any locus standi in judicio. Id. at 23, 24.

103 Id. at 17-20 (Judge G. Maridakis dissenting).
sion also preserves the position that the applicant is not a party before the Court but provides for a degree of equitable treatment that appears commensurate with the spirit of the Convention.\textsuperscript{104}

The case covers also another procedural point. Although it does not refer to the procedure before the Court itself or before the Commission, it deals with a provision of the Convention which is procedural but which may be of decisive importance for the judgment of the Court. One of the contentions of Lawless had been that the derogation from the rights guaranteed in Articles 5 and 6 of the Convention as allowed in Article 15(1)-(2) of the Convention had not been duly communicated to the Secretary General of the Council of Europe as provided for in Article 15(3)\textsuperscript{105} and that even if there was a sufficient notification, it could not be enforced against persons within the jurisdiction of the Republic of Ireland, with respect to the period before it was first made public in Ireland, seven weeks before

\textsuperscript{104} The topic dealt with in these decisions has, more recently, been considered by the Committee of Ministers with regard to the proceedings before them. In 1972, it decided:

The Ministers agreed that since the individual applicant is not a party to the proceedings before the Committee of Ministers under Article 32 of the European Convention, he has no right to be heard by the Committee of Ministers or to have any written communication considered by the Committee. This should be explained by the Secretary General to the applicant when he writes to inform him that the report of the Commission of Human Rights on his case has been transmitted to the Committee of Ministers in accordance with Article 31 of the Convention. If communications from the individual applicant intended for the Committee of Ministers are nevertheless received, the Secretary General should acknowledge their receipt and explain to the applicant why they will not form part of the proceedings before the Committee of Ministers and cannot be considered as a document in the case. In appropriate cases, the Secretary General might add that it is possible for the applicant to submit a new application to the Commission if he wishes to invoke important new information.

his dismissal from detention. The Irish Government had informed the Secretary General on July 20, 1957, that legislation allowing imprisonment in derogation from Articles 5 and 6 of the Convention had been brought into force on July 8, 1957. It gave the reasons for establishing exceptional detentions and called attention to the fact that under the Act a special Commission had been established to inquire into the grounds of the detention. It asked that the letter be considered as an information in compliance with Articles 15(3) of the Convention or in the alternative that the government was not deprived of reliance on Article 15(1) by any provision of Article 15(3). The Court found that the Irish Government had not delayed in notifying the Secretary General of the derogation. It added that Article 15(3) required only information to the Secretary General regarding the measures of derogation taken without any obligation to give notice of derogations in the framework of municipal law within Ireland. Thus, the detention of Lawless was founded on the right of derogation duly exercised by the Irish Government under Article 15 of the Convention.

The Court had, under this ruling, no opportunity to address itself to the question whether the requirement of notification of Article 15(3) of the Convention amounts to a substantive condition whose nonfulfillment would prevent a valid derogation in the sense of Article 15(1). The wording of paragraphs 1 and 2 of Article 15 as com-

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107 Lawless Case, [1961] 3 Eur. Ct. Human Rights 61-62. The Court also found unanimously that the substantive conditions of Article 15(1) (existence of a public emergency threatening the life of the nation, strict requirement by the exigencies of the situation of the measures taken in derogation from the obligations under the Convention, and consistency of the measures with other obligations under international law) were fulfilled. Id. at 55-60.
pared with paragraph 3 speaks against such an interpretation. In paragraph 1 the derogation is defined with express limitations and under a proviso clearly indicating the presence of conditions for its validity. Paragraph 2 likewise is specific as to the exclusion of derogation in certain cases. Paragraph 3 does not spell out the extent to which derogation is available. It only establishes the duty of any High Contracting Party availing itself of the right of derogation to inform the Secretary General of the Council of Europe of the measures taken under the right of derogation and of the reasons therefor as well as of the fact that such measures have ceased to operate and that the provisions of the Convention are again being fully executed. The last requirement seems to make it especially clear that paragraph 3 does not go to the substance of validity of the derogation. Certainly, the derogation would not be considered as persisting beyond the points indicated in this last requirement only because the duty of notification was not fulfilled. 108

B. De Becker Case

The relation between an applicant and the Court recurred in the De Becker Case 109 and was discussed within the framework of the question whether or not the Court should strike the case from its list. 110 The Court gave expression to the affinity of the De Becker Case with the Lawless Case in an order by the President of the Chamber of October 6, 1960, which granted the Commission a time limit of six weeks from the date of the Court's decision on the preliminary objections raised in the Lawless Case for the filing 111 for its first Memorial.

Raymond De Becker, a journalist of Belgian nationality, was condemned to death in 1946 by the Brussels Conseil de Guerre for

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108 In the "Greek" Case, the Commission denied that certain notifications by the Greek Government to the Secretary General of the Council of Europe fulfilled the requirements of Article 15(3) of the Convention. [1969] Y.B. EUR. CONV. ON HUMAN RIGHTS 41-43 (Eur. Comm. on Human Rights) (The Greek Case). But besides being less than a judicial decision, the opinion as to this point is only dictum, for the Commission came to the conclusion that the substantive requirement for the derogation under Article 15(1) of the Convention that there be a public emergency threatening the life of the Greek nation was not fulfilled. Id. at 76.


110 See Rule 47 of the Rules of Court, COLLECTED TEXTS, supra note 78, at 419.

collaboration with the German authorities in Belgium during World War II. The judgment also decreed the forfeiture of certain civil rights, among them any journalistic activity as set out in Article 123 sexies of the Belgium Penal Code. On appeal, the Brussels Military Court in 1947 commuted the death penalty to life imprisonment, confirming the rest of the judgment. In 1950, the sentence of life imprisonment was, in way of clemency, reduced to 17 years. In February 1951, De Becker was conditionally released upon making a declaration that he would voluntarily take up residence in France within one month of his release (which he did) and that he would not engage in politics.112

In September 1956, De Becker applied to the Commission. While declaring the application inadmissible as to certain points, the Commission considered admissible that part which disputed the compatibility of Article 123 sexies of the Belgian Penal Code with Article 10 of the Convention, which guarantees the right to freedom of expression with regard to the period after June 14, 1955, the date on which the Convention entered into force with respect to Belgium. The Commission reported, after failure to reach a friendly settlement, that only Article 10 was to be considered, not Articles 2, 4 and 5 of the Convention, and that certain paragraphs of 123 sexies of the Belgian Penal Code were not fully justifiable under the Convention “whether they be regarded as providing for penal sanctions or for preventive measures in the interests of public security;” that they were “not justifiable in so far as the deprivation of freedom of expression in regard to non-political matters, which they contain, is imposed inflexibly for life without any provisions for its relaxation when with the passage of time public morale and public order have been re-established and the continued imposition of that particular incapacity has ceased to be a measure ‘necessary in a democratic society’ within the meaning of Article 10, Paragraph 2, of the Convention.”113

On April 29, 1960, the Commission referred the case to the Court. In its letter to the Court, it pointed out that the Belgian government had referred on several occasions to the existence of proposals and draft legislation directed toward amending Article 123 sexies or mitigating its application and that at that very moment steps were

112 Id. at 7-10.
113 Id. at 10-12.
being taken in the Belgian Parliament to amend Article 123 *sexies*. As to the substance, the Commission and the Belgium government submitted opposing viewpoints as to the compatibility of Article 123 *sexies* with Article 10 of the Convention. On June 30, 1961, Belgian legislation was enacted that, in its application to De Becker, restored his rights to journalistic activities to the extent that they were not of a political character and, even as to those of a political character, limited his freedom of expression in a way that possibly did not go beyond the "formalities, conditions, restrictions, or penalties" admissible under Article 10(2) of the Convention. De Becker submitted to the Commission a statement that he considered that his application to the Commission had been met by the adoption of the act. It recognized that it gave everyone the possibility of regaining full rights of free expression including that of political expression, and regarded it as unnecessary to proceed with his case, therefore withdrawing his application. The Commission transmitted the text of this statement to the Court on October 7, 1961.

After this statement both the Commission and the Belgian government focused their attention on the point of whether the case should now be stricken off the list of the Court. The Commission expressed that it would not oppose such a solution on the basis of the fact that the applicant's interest had been met; however, in case

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114 *Id.* at 4, 13-14.
115 *Id.* at 12, 14-17. Under the changed conditions the Belgian Government asked the Court (1) to rule that in view of the present Belgian legislation De Becker had no interest in further proceeding on his application, (2) to rule that in determining the compatibility of Article 123 *sexies* of the Belgian Penal Code with the Convention, both in regard to the past and to the future, the provisions of the Act of June 30, 1961, must be taken into account, and (3) to state that there is no incompatibility between Article 123 *sexies* and the provisions of the Convention. The Commission asked the Court to confirm the Commission's view as to Article 123 *sexies* and to note that the limitations of the Act of June 30, 1961, as regards freedom of expression in so far as they apply to De Becker, do not go beyond the "formalities, conditions, restrictions, or penalties" authorized in Article 10, paragraph 2, of the Convention. Later the Belgian Government stated that both the Commission and the Belgian Government had identical views as to Article 123 *sexies* as amended by the Act of June 30, 1961, recognizing that the opinion of the Commission had contributed to this legislation and that there was no longer a single person in Belgium to whom the former Article 123 *sexies* was applicable; it therefore asked the Court to state that there is no incompatibility between the new Article 123 *sexies* and the provisions of the Convention and that there is no further need to deal with any application concerning this article. The Commission, however, wished the Court to say whether during the whole or part of the period between the entry into force of the Convention for Belgium (June 15, 1955) and the Act of June 30, 1961, the applicant was the victim of a violation of Article 10. *Id.* at 18, 19.
116 *Id.* at 19, 20.
of disapproval of the dismissal by the Court, it asked for a decision on some of the substantive matters.\textsuperscript{117} The Belgian government asked the Court to strike the case off the list or in the alternative, to declare that the present Article 123 \textit{sexies}, as applicable to De Becker, is not incompatible with the Convention.\textsuperscript{118}

The Court decided, by six votes to one, to strike the case off its list. It denied that De Becker's withdrawal of his application had any legal character or could produce the effects of a notice of discontinuance as provided in Rule 47 of the Rules of Court because it came from an individual not entitled to bring a case before the Court (Articles 44, 48 of the Convention); it also denied that the withdrawal was binding on the Commission which, as defender of the public interest, had to take the statement into account if it considered that it enlightened the Court on the points at issue. It found that in the last oral proceedings both Parties submitted to the Court final conclusions which, though differently formulated, concorded in that they asked to strike the case off the list and that therefore the proceedings after the enactment of the Act of June 30, 1961, no longer had any purpose. It became fitting, on general principles, to strike the case off the list. The Court realized that, under Article 19 of the Convention, it had the duty to insure the observance of the engagements undertaken by the High Contracting Parties to the Convention. Though there was no withdrawal by a Party it should apply Rule 47 of the Rules of Court analogously after both Parties had requested the striking of the case and therefore satisfy itself as to “whether it should proceed with the case (a) as to whether De Becker was the victim of a violation of the Convention between its entry into force with respect to Belgium and the entry into force of the Act of June 30, 1961” and (b) “as to De Becker’s

\textsuperscript{117} At the final hearing the Delegate of the Commission elaborated on the question of striking the case: (1) he submitted that the Court may have doubts as to whether the Act of June 30, 1961, was wholly compatible with Article 10 of the Convention based upon any finding that this Act did not totally exclude the possibility of a permanent loss of freedom of expression on political matters; (2) he emphasized that De Becker's statement about the withdrawal of his application was not binding upon the Commission or the Court and, therefore, should not be the only factor to be taken into account, though it was a factor of great weight; and (3) he wished that in the event of its striking the case off its list the Court would avoid giving the impression in its decision that the case had lost any purpose only because of De Becker's withdrawal of his application. \textit{Id.} at 21, 22.

\textsuperscript{118} \textit{Id.} at 21.
freedom of expression in the light of the provisions of Article 123 sexies of the Penal Code, as worded in the Act of June 30, 1961.”

As to the first point the Court did not see any reason to deny the concordant request of the Parties not to examine this question as to its substance; it declared that the modification of Article 123 sexies had rendered the original divergence of the Parties merely historic, especially as De Becker did not request any compensation for the past. As to the second point the Court considered it important that both parties admitted that there was no longer any incompatibility with Article 10 of the Convention even before De Becker's statement of withdrawal; despite the legal irrelevance of the “withdrawal” by the individual applicant, the case had originated from his complaint that his rights were violated. Under these circumstances the Court felt that there was no need to examine whether the implementation of the new Belgian act would raise problems of interpretation as it was not called upon, under Articles 19 and 25 of the Convention, to give a decision on an abstract problem relating to the compatibility of that act with the Convention.

In his dissenting opinion Judge A. Ross admitted that

[it could be argued that since, after the case was brought before the Court the defendant State took steps to change the legislation complained of and the applicant declared himself satisfied by the steps taken, there was no longer ground for dispute between the applicant and the defendant State and that, for this reason, the proceedings should, according to generally recognised [sic] principles for the administration of justice, be terminated.]

Yet, from the spirit of the Convention, the Judge concluded, the result was that the applicant has a right to have a decision by the Court on the question which the Commission put before it; even if changes have occurred after the Court was seized by the case, the applicant may have a legitimate interest in a decision, as to the legal status before the change, possibly for the sake of indemnification. Regarding the withdrawal of the application, the Judge emphasized that the function of the Court under Article 19 of the Convention, is “to insure the observance of the engagements undertaken by the High Contracting Parties in the present Convention”

119 Id. at 23-25.
120 Id. at 25-26.
121 Id. at 30.
and believed that after the case has proceeded beyond the Commission, public interest commands a decision regardless of the applicant's interest in it. He did not see in the withdrawal of the application a "friendly settlement" which under Rule 47(3) of the Rules of Court would authorize the Court to strike the case off the list. He considered the acceptance of a withdrawal by the Court as creating unfavorable public opinion because to a person not acquainted with the details of the case, it could easily appear that the withdrawal might have been coerced upon the applicant by his own defendant State. Therefore it could be inexpedient for the Court to strike the case off its list. He also denied that the "general principles" of either a private lawsuit or of criminal proceedings are applicable under the Convention. 

The opinion of the majority seems more convincing. The Belgian government had stated that there was no longer a single person in Belgium to whom the Article 123 sexies in its pre-1961 version was applicable. A judgment of the Court as to whether that version made De Becker a victim of a violation of the Convention between 1955 and 1961 would therefore have referred not only to a merely historical controversy but would have been as much in the abstract as the Court said an examination of whether the implementation of the Act of 1961 would raise problems of interpretation would be. A pronunciation as to the merits would clearly have been in the nature of an advisory opinion. The Court at the time of its judgment of March 27, 1962, was certainly not authorized to render an advisory opinion. This prior inability was reaffirmed in the Second Protocol of May 6, 1963, to the Convention which in Article 1 confers upon the Court the power to give advisory opinions if the Committee of Ministers of the Council of Europe so requests. It may be well to remember that "[s]uch opinions shall not deal with any questions relating to the content or scope of the rights or freedoms defined in Section 1 of the Convention" as would have been the case here where the right to freedom of expression was the substantive issue.

122 Id. at 30-33.
123 Text accompanying note 115 supra.
124 Text accompanying note 120 supra.
125 Second Protocol to the Convention, Article 1(1), COLLECTED TEXTS, supra note 78, at 28.
126 Id. art. 1(2).
127 See Convention, supra note 25, art. 10(1).
The majority considers the striking of the case off the list justified both on general principles and in terms of analogous application of Rule 47(1)-(2) of the Rules of Court. The dissenting opinion seems to be mistaken in its belief that the majority rejects completely any reliance on Rule 47. Its combination of reasons for striking the case off the list seems more realistic than the somewhat doctrinaire viewpoint of the dissent.

C. Languages Case

In the case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" the Court dealt with several procedural aspects of bringing an action before the Court. The case originated from six applications by individuals against the Kingdom of Belgium brought before the Commission under Article 25 of the Convention. These applicants, parents of Belgian nationality, applied both on their own behalf and on behalf of their minor children. Representing more than 800 individuals, the group indicated they were French-speaking and expressed themselves most frequently in French. They complained that various Belgian laws provided for no or only inadequate French-language education in the municipalities where they lived and in other ways directly or indirectly obstructed the French-language education of their children in the municipalities where they lived, thereby violating Articles 8, 9, 10, and 14 of the Convention and Article 2 of the Protocol to the Convention of March 20, 1952. The Commission admitted the six applications as to the alleged violations of Articles 8 and 14 of the Convention and Article 2 of the Protocol, but rejected them to the extent they were based upon Articles 9 and 10 of the Convention. Since the attempt at reconciliation failed, the Commission

129 Id. at 24, 25.
130 Id. at 33.
132 Language Case, supra note 131, at 3-5. The Court's preliminary decision was on May 3, 1966, and its judgment on preliminary objection was on February 9, 1967. Id.
133 Id. at 7, 10, 11.
134 COLLECTED TEXTS, supra note 78, at 20-25 [hereinafter cited as Protocol].
135 Language Case, supra note 131, at 11.
drew up the Report required under Article 31 of the Convention and transmitted it to the Committee of Ministers of the Council of Europe on June 25, 1965. Basically denying that the Belgian legislation was incompatible with either the Convention or the Protocol, the Commission did find it violative of the Convention or the Protocol on three counts. On the day the Commission submitted the Report to the Committee of Ministers, it also brought the case before the Court under Article 48(a) of the Convention.  

Before a discussion of the controversial part of the preliminary objection made by the Belgian government, two non-controversial points of the procedure before the Court deserve some observations. Mr. Rolin, the elected Judge of Belgian nationality, was to sit as an *ex officio* member of the Chamber which was to consider the case according to Article 43 of the Convention. However, he withdrew because as a Senator he had taken part in the drafting of the Acts of Parliament in dispute. The Belgian government thereupon appointed another person as an *ad hoc* Judge. The present case may

134 *Id.* at 12.

The following may bring a case before the Court, provided that the High Contracting Party concerned, if there is only one, or the High Contracting Parties concerned, if there is more than one, are subject to the compulsory jurisdiction of the Court or, failing that, with the consent of the High Contracting Party concerned, if there is only one, or of the High Contracting Parties concerned if there is more than one:  

(a) the Commission.

Convention, *supra* note 25, art. 48(a), 213 U.N.T.S. 246.

137 *Id.* at 7; Rule 24(2) of the Rules of Court, *Collected Texts supra* note 78, at 410.

138 Rule 24(2) of the Rules of Court which the Judge cited expressly as the reason for his withdrawal, reads:  

A judge may not take part in the consideration of any case in which he has a personal interest or in which he has previously acted either as the agent, advocate or adviser of a Party or of a person having an interest in the case, or as a member of a tribunal or commission of enquiry, or in any other capacity.

*Id.* Obviously, this rule deals with the exclusion by law of a judge from participating in an individual case as distinguished from Rule 24(3) which states: "If a judge considers that he should withdraw from consideration of a particular case or if the President and the Judge shall consult together. In case of disagreement, the President shall decide." *Id.* at 411. This latter paragraph contemplates not an exclusion by law but a discretionary disqualification for reasons less stringent than those enumerated in paragraph two. The last phrase (of Rule 24(2)) "in any other capacity," must be read in connection with the words "in the consideration of any case . . . . in which he has previously acted." Does the participation in the drafting of a disputed legislation amount to any previous acting in the case? The case does not reveal whether Mr. Rolin had voted for or against the adoption of the contested legislation, nor whether he had voted at all. In any of these cases it could be doubtful whether legislative activity as such would amount to acting in the case similar to the acting as an agent for a Party as enumerated by the rule.

139 The appointment was pursuant to Rule 23(1). *Id.* at 410.
not fall within the exclusion of Rule 24(2) of the Rules of Court but the Judges's broad interpretation of the Rule is preferable to a restrictive application.\footnote{A problem related to the one here under consideration is whether the participation of a legislator in the enactment of a law will exclude him from a court that probes into the constitutionality of the legislation. This question has been answered in the negative in the Federal Republic of Germany:} 

A non-controversial point of procedure arose when the Chamber relinquished jurisdiction to the plenary Court\footnote{There is no need for discussion of a second exclusion that took place after the Chamber relinquished its jurisdiction to the plenary court. One of the Judges of the plenary Court was eliminated from taking part in the consideration of the case since he had dealt with it as a member of the Commission before he had been elected a Judge of the Court, a clear application of Rule 24(2) of the Rules of Court.} because "the case before it [raised] a number of serious questions affecting the interpretation of the Convention, especially its Articles 45, 8, and 14, and Article 2 of the Protocol."\footnote{Languages Case, supra note 131, at 9. The quoted words used by the Court paraphrase the text of Rule 48(1).} The Belgian government had requested this action claiming the judgment could "provoke extremely violent political feelings in Belgium, which in turn could exert a substantial influence on the structure of the Belgian State." The government also wanted the Court to decide whether some of the applicants' questions should be determined by the Contracting States, rather than the Court, and that the Commission's interpretation of Article 14 of the Convention conflicted with some former decisions of the Commission.\footnote{Id. at 8.} The Commission declared that "considering the particular nature of the case," it would not object to relinquishment of jurisdiction to the plenary Court.\footnote{Id.} In its first Memorial, the Commission unanimously referred the matter to the Court, basing its decision on the legal importance and complexity of the case and its
human and social repercussions.

The Belgian Government made these points:145 (1) the Convention and its Protocol secure the rights and freedoms enumerated in Articles 2-13 of the Convention and Articles 1-3 of the Protocol; (2) the idea of "national minority" within the meaning of Article 14 of the Convention may benefit the members of a specified social group where there is a violation of one of the rights or freedoms mentioned above; (3) however, in the cases before the Court the Convention offers no protection since (a) the right of education in one's own language is not included among the rights and freedoms secured by the Convention and the Protocol and subsidiarily (b) the applicants do not belong to a "national minority" within the meaning of Article 14 of the Convention. The Memorial concluded that the Court is not

145 More in detail, the argument of the Belgian Government ran this way—the Court lacks jurisdiction because there is no connection between the applicants' complaint and the terms of the Convention and the Protocol; their complaint is that the State does not accord them certain services in the field of education in the French language. The Convention and the Protocol establish purely negative duties upon the contracting States, namely those not to interfere and not to refrain from action. Article 14 of the Convention does not form part of the enumeration of rights and freedoms in Articles 2-13 of the Convention and Articles 1-3 of the Protocol but only prohibits any discrimination in the enjoyment of these rights; it neither adds any further rights nor does it change the purely negative obligations resulting from the Convention and the Protocol into duties to provide something. Therefore the complaints are not covered by the Convention or the Protocol but refer so clearly to the reserved domain of the Belgian legal order that there is no need for either an explicit clause in the Convention or a reservation under its Article 64 to exclude the complaints from the Court's jurisdiction. Consequently, the Court is faced with a preliminary question before pronouncing upon the merits of the case even if to answer this preliminary question the Court should have to touch on occasion, on the merits of the case; this position was implicitly taken already before the Commission when the Belgian Government asked to reject the applications as manifestly ill-founded in the sense of Article 27(2) of the Convention. Id. at 14-17.

The Commission argued for the rejection of the preliminary objection in this way: Commission and Court were set up to insure the observance of the engagements undertaken by the Contracting States in the Convention; Convention, supra note 25, at art. 19. Under the Convention, an objection ratione materiae should have been raised before the Commission with regard to the admissibility of the applications; though the failure of the Belgian Government to do so should not have a preclusive effect. The Court, after the Commission had referred the case to it, needs only a summary examination, without forming an opinion about the views of the Commission on the merits, to enable it to verify that the complaints declared admissible by the Commission concern the interpretation or application of the Convention as prescribed in Article 45 of the Convention. Commission and Government here diverge as to the interpretation and application of the Convention, especially of its Article 14; therefore, the Court had jurisdiction under Article 45. After this is established the idea of the reserved domain could have any place only to the extent that a Contracting State has availed itself of a reservational option under Article 64 of the Convention which is not the case as to Belgium. Language Case, supra note 131, at 17.
competent *ratione materiae* to examine the merits of the case and asked the Court to admit the preliminary objection and dismiss the action brought against the Belgian Government or to join the preliminary objection to the merits. The Commission also asked the Court to reject the objection of the Belgian Government. It did not express an opinion about the alternative Belgian submission, but left this point to the wisdom of the Court.

The Court referring to Article 49 determined that "in the event of a dispute as to whether the Court has jurisdiction the matter shall be settled by the decision of the Court." The Court found authority for its decision on the preliminary objection in Articles 19 and 45 of the Convention. Article 19 established the Court "[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention," while Article 45 extended "[t]he jurisdiction of the Court . . . to all cases concerning the interpretation and application of the present Convention. . . ." The Belgian Government sought a dismissal for lack of jurisdiction but all the complaints raise questions concerning the interpretation and application of the Convention, thereby vesting the Court with jurisdiction. The Court’s examination of the rights which applicants claim under Article 8 and 14 of the Convention and Article 2 of the Protocol and whether these provisions place obligations upon the Belgian State calls for an exploration of the merits in conjunction with a decision regarding interpretation and application inseparable from the merits. The Commission’s decision under Article 27 of the Convention finding the complaints admissible and its Report to the Committee clearly indicate the need for an interpretation of the Convention. The problems now before the Court are part of the merits and cannot be solved by a ruling on a preliminary objection. The jurisdiction of the Court *ratione materiae* is so evidently established that it must be affirmed at this stage.

The Belgian Government’s contention that certain questions are the reserved domain of the Contracting States also concerns the merits of the claims and cannot be resolved now. The Government
attempted to show the absence of any factor relating to the Convention, but failed to convince the Court. Both the Convention and the Protocol relate to matters normally of the domestic legal order, but they are international instruments designed to establish certain international standards to protect persons under the Contracting States’ jurisdiction (Article 1 of the Convention). This case concerned with the interpretation and application of those instruments vests the Court with jurisdiction which cannot be defeated by the plea of reserved domain. The decision of the Court, procedural in nature reads: “[The Court] [r]ejects unanimously the submissions, both principal and alternative, of the Belgian Government [and] [d]ecides unanimously to proceed to the examination of the merits of the case.”

The cornerstone of this judgment is the Court’s use of its power to determine its own jurisdiction. Once a High Contracting Party recognizes the jurisdiction of the Court as compulsory and therefore existing without special agreement, the only restriction which that party may impose is the requisite reciprocity on the part of several or certain other High Contracting Parties or a limitation on the time period of jurisdiction. The more general right to make reservations when signing the Convention or when depositing the instrument of ratification cannot be used to establish further restrictions on the jurisdiction of the Court. That right may only be exercised in respect to “any particular provision of the Convention to the extent that any law then in force in [a contracting party’s] territory is not in conformity with the provision.” Obviously, this clause refers to the substantive provisions of the Convention, not to the procedural provisions establishing the jurisdiction of the Court. This result is reinforced by the provision: “Reservations of a general character shall not be permitted under this Article.” A High Contracting Party that has not recognized the jurisdiction of the Court as compulsory ipso facto but consents to its jurisdiction

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151 Language Case, supra note 131, at 18-20.
152 Convention, supra note 25, art. 49.
153 Id. art. 46 (1).
154 Id. art. 46(2).
155 Id. art. 64(1), cl. 1.
156 Text accompanying note 154 supra.
157 Convention, supra note 25, art. 64(1), cl. 2.
in an individual case may restrict its consent in some ways not permitted when jurisdiction is compulsory. After finding that the Convention authorized the Court's jurisdiction to determine its own jurisdiction over the subject matter, the Court could easily determine its jurisdiction in handling the present case. The breadth of the Convention's mandate extending jurisdiction of the Court "to all cases concerning the interpretation and application of the present Convention..." as discussed above, obviously includes this case.

In deciding the merits of the case, the Court held in its judgment of July 23, 1968, by eight votes to seven, that Section 7(3) of the Belgian Act of August 2, 1963, does not comply with the requirements of Article 14 of the Convention read in conjunction with Article 2 of the Protocol in so far as it prevents certain children, solely on the basis of the residence of their parents, from having access to French-language schools existing in the six communes on the periphery of Brussels. The Court reserved for the applicants the right to apply for just satisfaction in regard to this particular point. With regard to all other points at issue the Court unanimously denied any violation of the Convention or the Protocol.

D. Wemhoff Case

K. H. Wemhoff, a national of the Federal Republic of Germany filed an application against the government of the Federal Republic of Germany.
of Germany, alleging that the courts of West Berlin violated his rights under Article 5(3) of the Convention to be brought to trial within a reasonable time or released pending trial. He claimed an unreasonable length of detention on remand during a criminal proceeding against him and sought compensation for the damage suffered, reserving the right to specify the exact amount of his claim later. The Commission declared the application admissible in respect to Article 5(3) and also ex officio with reference to Article 6(1) of the Convention. After the failure of an attempt to arrange a friendly settlement, the Commission sent its report to the Committee of Ministers of the Council of Europe on August 17, 1966. By request, the Commission referred the case to the Court.

The applicant Wemhoff was arrested under suspicion of breach of trust on November 9, 1961, and a Berlin district court ordered his detention on remand the next day. The court feared that, if left at liberty, Wemhoff would abscond and attempt to suppress evidence. The Berlin courts upheld the warrant under reexamination ex officio and review of various applications and appeals of the applicant. The complex case required an indictment of 855 pages, which was filed on April 23, 1964, about three and one-half months after the applicant approached the Commission on January 9, 1964. On the basis of the indictment the Regional Court replaced the existing detention order by a new one on July 7, 1964, citing grave suspicion of breach of trust, complicity in breach of trust, fraud, offenses against the Bankruptcy Act, and the danger of absconding due to the likelihood of a grave sentence, and, on July 17, 1964, committed him to trial.

The trial lasted from November 9, 1964, until April 7, 1965, when the Regional Court found the applicant guilty of prolonged abetment to breach of trust and sentenced him to 6 years and 6 months of penal servitude and a fine of 500 DM, the period of detention on remand being counted as part of the sentence. The court ordered continued detention on remand for the reasons given in the earlier

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167 Id. at 12.
168 Id. at 4, 13.
169 The complexity of the case was evidenced by 10,000 pages of investigative reports. Id. at 10.
170 Id. at 6-10, 12.
171 Id. at 10.
order. Further demands for release were rejected, as were appeals from these decisions. The applicant then lodged an appeal on the merits of the conviction with the Federal Court which rejected the appeal on December 17, 1965, ordering that the time in detention since the first judgment of April 1965, be counted as part of the sentence in so far as it exceeded 3 months. On November 8, 1966, after serving two-thirds of the sentence, the applicant was conditionally released by order of the Regional Court.\footnote{Id. at 10-12.}

The opinion of the Commission, expressed in its Report to the Council of Ministers, held essentially that: the applicant, in violation of Article 5(3) of the Convention, had not been brought to trial "within a reasonable time" or released pending trial; counting the period of detention on remand as part of the sentence would not affect that conclusion; the applicants continued detention on remand was a "lawful detention" within the meaning of Article 5(1)(c) of the Convention; the applicant's claim for compensation under Article 5(5) could not be considered before the Court or the Committee of Ministers had decided whether Article 5(3) had been violated and the applicant had had an opportunity to exhaust, in accordance with Article 26, the domestic remedies under German law as to the compensation; and, even considering the period from November 9, 1961, to December 17, 1965, Article 6(1) of the Convention had not been violated.\footnote{Id. at 13, 14.}

The German Government, after agreeing with the Commission's counting of the period of detention on remand to be examined as to its reasonableness but disagreeing with the Commission's opinion that this period was unreasonable,\footnote{Id. at 18-21. The arguments of the Commission before the Court dealt entirely with the merits of the case, not with procedural matters and may therefore be omitted here. For some future procedural discussion it should be mentioned that the Commission took into account, as to the length of the applicant's detention on remand, the period from his arrest on November 9, 1961, up to the date of the opening of the trial on November 9, 1964 (exactly 3 years). Id. at 16. It asked the Court to decide (1) whether or not Article 5(3) of the Convention has been violated by the detention up to November 9, 1964 or any later date; and (2) whether or not Article 6(1) of the Convention has been violated by the duration of the criminal proceedings between November 9, 1961 (or any later date) and the judgment of the Regional Court of Berlin of April 7, 1965 (or any later date). Id. at 18.} asked the Court to find "that the decisions and measures taken by German authorities and courts in the case are compatible with the commitments entered into by
the Federal Republic under Articles 5(3) and 6(1) of the Convention.\footnote{Id. at 21.}

The Court decided in its judgment of June 27, 1968, that there has been no breach of Article 5(3) or Article 6(1) of the Convention; therefore the question of compensation does not arise.\footnote{Id. at 27.} Taking notice of the request of the Commission to decide about any violation of Article 5(3) of the convention by the detention up to November 9, 1964 (or any later date), the Court judged that the reasonableness of the detention is to be decided for the period from the arrest up to the delivery of the first judgment, that is, up to April 7, 1965. The Court rejected the idea that the requirement of a "reasonable time" in Article 5(3) extends only to the beginning of the trial but concluded from the unambiguous French text, "jugé," as compared with the less clear English text, "entitled to trial," that the period extends to the end of the trial by judgment.\footnote{Id. at 22-24.}

Though neither the Commission nor the government raised any procedural questions in the arguments, some special procedural qualifications of the Rules of Court were applied. The President of the Court chose \textit{ex officio} to draw names of three substitute Judges, the first of whom later replaced one of the original Judges.\footnote{Id. at 5. \textit{See} Rules 21(4) and 22 of the Rules of Court. \textit{Collected Texts}, \textit{supra} note 78, at 409-10.} The Chamber, upon request of the German Government, authorized its agent, counsel and advisors to use the German language in the oral proceedings, giving the Government the responsibility of insuring interpretation of the arguments into French or English.\footnote{Wemhoff Case, [1968] 7 Eur. Ct. Human Rights 28-32.} Procedural aspects of greater importance are touched upon in the concurring opinion of Judge Terje Wold.\footnote{Wemhoff Case, [1968] 7 Eur. Ct. Human Rights 5. \textit{See} Rule 27(2) of the Rules of the Court, \textit{Collected Texts}, \textit{supra} note 78, at 412. Apparently no authorization to use the German language in documents submitted was requested or granted.} This Judge approached the question of whether the applicant's rights under Article 5(3) of the Convention to be brought to trial "within a reasonable time" or released pending trial, were violated from what he calls a
"procedural" angle. He noted that the applicant claimed compensation for the damage suffered while being detained on remand. In his final conviction the period of detention (except for 3 months during the period of his appeal to the Federal Court) was counted as part of the sentence. Given the fact that the applicant had been found guilty of very serious crimes the Judge found it difficult to imagine that he had any claims for compensation. These two points together show that the case was purely theoretical in the Judge’s opinion. He admitted that he alone held this opinion, and therefore, did not pursue his point.\footnote{Id. at 28.} The judgment of the Court, indeed, did not consider this argument and rightly so. Neither the counting of detention time on remand toward the penalty nor the absence of sufficient grounds of compensation eliminates the applicant’s interest in the question of whether or not he was brought to trial within a reasonable time.

Judge Wold’s second point of a procedural nature affirmed the Court’s competence to deal with the period of detention from the date of filing the application until the final judgment. Judge Wold realized the application was directed against continued conduct of the German authorities and that the applicant when claiming that he was detained beyond a reasonable time implied the whole period of the provisional detention.\footnote{Id. at 29.} Actually both the Commission and the Court have pursued the same line of thinking without discussing it expressly.

E. Neumeister Case

The length of the detention on remand was also the main issue in the Neumeister case, decided by the Court in its judgment of June 27, 1968.\footnote{Neumeister Case, [1968] 8 Eur. Ct. Human Rights, reprinted in [1968] Y.B. Eur. Conv. on Human Rights 812-31 (Eur. Comm. on Human Rights). As to the decision of the Commission about admissability see [1964] Y.B. Eur. Conv. on Human Rights 224-51. This judgment was rendered on the same date as that in the Wemhoff Case. The composition of the two chambers was not identical.} The case was initiated by an application lodged with the Commission on July 22, 1963, by Fritz Neumeister, an Austrian national, against the Republic of Austria.\footnote{Neumeister Case, [1968] 8 Eur. Ct. Human Rights 4.} The Commission’s Report was transmitted to the Committee of Ministers on
August 17, 1966. Both the Commission and the Austrian Government referred the case to the Court on October 7 and 11 respectively.

The facts of the case can be summarized briefly for the purpose of examining the procedural aspects. On August 10, 1959, the Vienna Revenue Office denounced Neumeister and several other persons before the Vienna Public Prosecutor for having defrauded the Exchequer between the years 1952 and 1958 by improperly obtaining reimbursement of millions of schillings of a sales tax which was designed to assist exports. The possible punishment for the acts involved was "severe imprisonment" from five to ten years. On the following day, August 11, 1959, the Vienna Public Prosecutor requested the Vienna Regional Criminal Court to open a preliminary investigation. Neumeister appeared on January 21, 1960, for the first time as a "suspect" before the Investigating Judge at which occasion he protested his innocence. The Investigating Judge opened a formal preliminary investigation on February 23, 1961, and ordered that Neumeister be taken into detention on remand, which he was on the following day. After a number of interrogations Neumeister was provisionally released on parole May 12, 1961, and was not required to post security. During the ensuing period of freedom Neumeister made two trips abroad with the Judge's permission.

After strong implication by a codefendant who had fled abroad (but who was arrested in the Federal Republic of Germany in June 1961 and extradited to Austria in December 1961) the Investigating Judge ordered Neumeister's arrest on July 12, 1962, upon request of the Public Prosecutor. Neumeister was arrested on the same day and remained in detention on remand until September 16, 1964. On that day he was released upon a guarantee of one million schillings, his "solemn undertaking" and the deposit of his passport with the court. During this period Neumeister made a number of attempts to be released by the Court. His first two attempts were

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185 Id. at 22.
186 Id. at 4.
187 Id. at 6-8.
188 Id. at 8-10. The date of 12th July 1961 given on page 9, number 12 is obviously a printing error; the correct year is 1962.
189 Id. at 19.
190 Id. at 10-19.
rejected with finality by decisions of the Court of Appeal of Vienna of September 10, 1962, and February 19, 1963, respectively. Upon the later rejection Neumeister reacted by lodging his application of July 12, 1963, with the Commission. The various decisions concerning Neumeister’s detention on remand were all taken after a hearing not open to the public during which the Public Prosecutor was heard in accordance with the Austrian Code of Criminal Procedure, but in absence of the defendant and his legal representative.

The preliminary investigation was concluded on November 4, 1963. The Public Prosecutor after studying the voluminous file completed the 219-page indictment on March 17, 1964. The trial began on November 9, 1964, but on June 18, 1965, the Court postponed its completion indefinitely so that the investigation might be completed. It was resumed on December 4, 1967, and was still continuing when the Court rendered its judgment of June 27, 1968.

The Commission declared the application admissible in so far as it was based on Articles 5(3), 5(4) and 6(1) of the Convention, the last one under both viewpoints of “reasonable time” and “equality of arms.” In its Report it expressed the following opinion: (1) by eleven votes against six, the detention of the applicant lasted beyond a “reasonable time” (violation of Article 5(3) of the Convention); (2) by six votes against six votes with the President’s casting vote the applicant’s case was not heard within a “reasonable time”; and (3) with eight votes against two with two abstentions, the proceedings regarding the applicant’s release complied with Articles 5(4) and 6(1) of the Convention.

In its judgment of June 27, 1968, the Court decided unani-
mously that there had been a breach of Article 5(3) of the Convention; by five votes to two, that there had been no breach of Article 6(1) regarding the length of the proceedings; unanimously, that there had been no breach of Article 5(4) or Article 6(1) as to "equality of arms" in the examination of the request for release.202 In its opinion it dealt with the points of procedure203 as follows: the Court cannot consider whether the first period of detention (February 24 to May 12, 1961) in itself was compatible with Article 5(3) of the Convention for the reason that the applicant approached the Commission only on July 12, 1963, long after the 6-month time limit of Article 26 in fine had expired. Yet this first period of detention is to be taken into account in assessing the reasonableness of the later cant as from January 21, 1960, when he was first heard by the Investigating Judge as being suspected of the criminal offenses concerned or from any other date; and (3) whether or not Article 6(1) or Article 5(4) or the two provisions combined had been violated by the procedure with respect to appeals lodged by the applicant against his detention pending trial. The Austrian Government asked the Court to declare that the measures taken by the Austrian authorities which were the object of the application and of the Report of the Commission did not conflict with the obligations arising from the Convention. Id. at 36. 202 Id. at 44.

203 As far as questions of procedure are involved the Commission argued to point one of its Report that the 6 months time limit for lodging an application under Article 26 in fine of the Convention precludes it from expressing an opinion on whether the length of the applicant's first detention of 2 months and 17 days (from February 24 to May 12 of 1961) was "reasonable"; that, on the other hand, it had considered the entire period of 26 months and 4 days of the second detention (from July 12, 1962, to September 16, 1964), rejecting the Government's contention that only the period up to the lodging of the application should be relevant. Id. at 25. As to point two of its Report the Commission stressed that it did not attach great weight to the fact that the applicant hardly complained at all on this score because it believed that on the basis of Rule 41(1)(d) of its Rules of Procedure it is competent to consider any point of law that seems to it to arise from the facts of an application also in relation to an article of the Convention not expressly invoked by the applicant. Rule 41(1)(d) of the Rules of Procedure of the Commission reads: "The application shall mention . . . as far as possible the provision of the Convention alleged to have been violated." This pleading could appear in conflict with what the Commission expressed, at the admissibility stage, with regard to an alleged violation of Article 6(3) of the Convention: "[I]t did not consider it necessary to pronounce upon the alleged violation of Article 6(3) as the Applicant had not pursued this point." However, apparently the Commission distinguished this part from the one regarding Article 6(1) by the applicant not having submitted any facts relating to Article 6(3). Id. at 28.

The Austrian Government argued with regard to procedural questions that the Commission exceeded its competence conferred upon it by Articles 24-31 of the Convention when it considered the period spent by the applicant in detention after lodging his application with the Commission on July 12, 1963. Id. at 30. It claimed a further over-stepping of the Commission's competence when it considered a violation of Article 6(1) of the Convention as, in the Government's view, the applicant had made no complaint in this regard and the problem in question played no part as to the admissibility of the application. Id. at 34.
detention from July 12, 1962, to September 16, 1964, for the first period also constitutes a departure from the principle of personal liberty. In case of conviction, it too would normally be deducted from the term of imprisonment, thus reducing its actual length.\textsuperscript{294} The Court agreed with the Austrian Government that the period of detention after the second arrest on July 12, 1962, was to be taken into account, although the application was filed with the Commission while the applicant was still in detention.\textsuperscript{295} It rejected the government’s view that the Court could not consider the applicant’s detention subsequent to the filing of his application with the Commission on July 12, 1963, because the application could relate only to facts that had taken place before that day. The Court saw in the application not a complaint about an isolated act but rather about a situation which was to last until a provisional release; to demand the filing of a new application with the Commission after each rejection of a request for provisional release would be excessively formalistic and cause a confusing multiplicity of proceedings.\textsuperscript{296}

With regard to the question concerning the length of the proceedings the Court agreed with the Commission that the Commission was competent to consider, even \textit{ex officio}, whether the facts referred to in an application disclosed violations of the Convention other than those of which the application complains and applied this principle also to the Court itself. However, it was doubtful whether the question arose in the present case as the applicant had expressly mentioned Article 6(1) in the document filed on July 6, 1963.\textsuperscript{297} It emphasized that the final point for establishing “reasonableness” had not yet arrived as no judgment has yet been rendered, but even so it came to the conclusion that there had been no breach in this regard.\textsuperscript{298}

Finally, as to the claim of violation of the principle of “equality of arms” in the proceedings concerning the release, the Court viewed the procedure followed as in general contrary to the principle of “equality of arms” in the meaning of Article 5(4) or 6(1) or possibly of these two Articles read in conjunction. However, the Court did not consider this principle to be applicable to the examination of

\textsuperscript{294} Id. at 37.
\textsuperscript{295} Id. at 37, 38.
\textsuperscript{296} Id. at 38. This reasoning of the Court follows the one applied in the \textit{Wemhoff Case}.
\textsuperscript{297} Id. at 41.
\textsuperscript{298} Id. at 41, 44.
requests for provisional release. The Court held the remedies relating to retention on remand to be a matter of criminal law and not of "civil rights and obligations" in the sense of Article 6(1)—as some members of the Commission had found—and that the text of Article 6(1) as to criminal matters expressly limits the requirement of a fair hearing to the determination of any criminal charge which does not include the remedies in question; furthermore, the Court noted that Article 6(1) does not merely require that the hearing be fair but also that it should be public and that publicity in such matters is in general not in the interest of accused persons. The Court also denied that the application of the principle of equality of arms to the proceedings against detention on remand resulted from Article 5(4) of the Convention which only demands that such proceedings be allowed and have to be taken before a "Court." This term, the Court decided, only required an authority of a judicial character that is independent both of the executive and of the parties to the case, without relating to the procedure to be followed, except that the provision requires a speedy procedure which speaks against full written proceedings or oral hearings of the parties. 2

The most interesting point of the Judgment seems to be the Court's well-taken attitude toward the Convention's requirements regarding the equality of arms in proceedings against the detention on remand. The five to two split as to the question whether the total length of the proceedings violated the "reasonable time" requirement of Article 6(1) centered around the problem of whether the extraordinary complication of the investigation justified the unusual length of more than seven years of the proceedings. Judges Holmbäck and Zekia denied this question in their separate opinions. 2

The decision that there was a violation of Article 5(3) led to a proceeding under Article 50 of the Convention. The judgment in it was rendered only in 1974 and will be treated in connection with other judgments regarding this article, rendered in 1972 and 1973. 2

F. Stögmüller Case

A third case dealing with a possible violation of Article 5(3) 2 is

209 Id. at 43, 44.
210 Id. at 46-48.
211 Text accompanying note 421 infra.
212 Article 5(3) states that "Everyone arrested or detained . . . shall be entitled to trial
the case of Stögmüller v. Austria, which was decided by the Court in its Judgment of November 19, 1969. The case, which originated in an application against the Republic of Austria lodged with the Commission on August 1, 1962, by Ernst Stögmüller, an Austrian national, was referred to the Court both by the Commission and the Austrian Government. Stögmüller's activities consisted of real property transactions including the advancing of loans secured by real property, especially to property owners threatened with foreclosure. Stögmüller was arrested, under a decree of the Linz District Court, on March 3, 1958, under the suspicion of having violated the Usury Act. He was held in custody because of the danger of absconding and the danger of suppression of evidence. Stögmüller did not object but asked for a transfer to the Investigating Judge at Wels. The Wels Court opened a preliminary investigation on March 10, 1958. He was again held in custody because of the danger of suppression of evidence. Stögmüller did not object or withdraw an application for release made earlier, but protested his innocence. At his request the case was transferred to the Regional Court of Linz. On April 21, 1958, Stögmüller was released on parole upon his solemn undertaking. In June 1958 new information alleging fraud, misappropriation and profiteering by Stögmüller and others reached the Public Prosecutor in Linz. The Investigating Judge in Linz had just begun extensive inquiries when Stögmüller, in October 1958 requested and obtained a transfer of the case to the Regional Court in Vienna. This Court decided in November 1960 to continue or extend the preliminary investigation so that it embraced some 78 cases of aggravated fraudulent conversion, fraud, usury or embezzlement. Stögmüller was informed on February 10, 1961, of the facts being held against him.

within a reasonable time or to release pending trial . . . ." Convention, supra note 25, at 226.


214 Id. at 4. Both referrals were made in time. The President of the Court referred the case to the Chamber set up to hear the Neumeister Case. Id. at 4, 5.

215 Contrary to the Regulation on usury which allowed commissions up to 2 percent, Stögmüller usually obtained from 6 to 7 percent and sometimes even 15 percent. A proceeding connected with these activities for aggravated fraud on five counts ended with a sentence of May 28, 1963, to imprisonment for 5 months on one count and acquittal on the other counts; the penalty was on March 5, 1964, reduced to 4 months. Stögmüller's application to the Commission was not directed against these proceedings. Id. at 7-8.

216 Id. at 8-10.
In summer 1959, Stögmüller began to take flying lessons to become a professional pilot. He took flights to many airports within and outside Austria. The Public Prosecutor obtained several extensions of the scope of the preliminary investigation and upon his request, the Investigating Judge ordered Stögmüller's arrest on August 24, 1961, because he had broken his undertaking by traveling abroad and had committed further offenses in 1960 and 1961 at the expense of borrowers (danger of repetition of offenses). He was held in custody because of the danger of absconding and of the danger of suppression of evidence. On August 29, 1961, Stögmüller lodged his first appeal against this decision; it was rejected on October 19, 1961, by the Judges' Chamber of the Regional Court of Vienna which held that there was both danger of absconding and danger of repetition of offenses. Stögmüller attacked this decision on October 25, 1961, yet his further appeal was rejected by the Court of Appeal in Vienna on November 10, 1961. It denied the presence of a danger of absconding but upheld that of a danger of repetition of offenses.\footnote{\textit{Id.} at 12-18.}

A second application for release was refused by the Investigating Judge on January 3, 1962; his appeal from this decision was rejected by the Judges' Chamber on January 25, 1962, and his further appeals of January and February 1962 were refused by the Court of Appeal on March 14, 1962. In April and May 1962, Stögmüller lodged several disciplinary complaints against the conduct of the Investigating Judge. Then followed, on August 1, 1962, his application to the Commission. Further disciplinary, recusational and constitutional complaints brought forward between October and December 1962 were without success. On August 9, 1963, Stögmüller lodged a third application for provisional release, offering a substantial security. The Investigating Judge released Stögmüller on bail as the danger of repetition of offenses had ceased and the danger of absconding could be overcome by the making of a solemn undertaking and deposit of security. Stögmüller had been in detention from March 3 to April 21, 1958, and from August 25, 1962 to August 26, 1963. After completion of the preliminary investigation in July 1966 and indictment on August 1, 1967, Stögmüller's trial took place from April 17 to May 9, 1968, on which day he was sentenced to four and one half years severe imprisonment and to the repayment to the victims of over 315,000 schillings. The periods spent in provisional
detention or in detention on remand were counted toward the sentence. Stögmüller started serving his sentence on September 4, 1968.\textsuperscript{218}

The Commission declared the application admissible on October 1, 1964, as to a violation of Article 5(3) of the Convention, the only claim maintained by the applicant, and decided not to avail itself of this competence to examine further \textit{ex officio} the applicant’s original complaint as to a violation of Article 6(1) and (3) of the Convention which had later been dropped by him. It stated in its opinion that Article 5(3) had been violated.\textsuperscript{218}

In the arguments of the Commission its Delegates, besides elaborating on the method to be applied in establishing “reasonable time” within the meaning of Article 5(3) of the Convention, replied to various objections of the Government\textsuperscript{220} concerning the counting

\textsuperscript{218} Id. at 18-28.
\textsuperscript{219} Id. at 28-30.
\textsuperscript{220} The Government claimed that the Commission could deal only with facts that existed before lodging of the application on August 1, 1962, so that the detention on remand from that date up to the release on August 26, 1963, should not have been considered by the Commission, but only the detention from August 25, 1961 to August 1, 1962. It argued further that the Commission had erred when it declared the application admissible and in this regard had acted contrary to Article 26 of the Convention which provides that the Commission may only deal with the matter after the exhaustion of all domestic remedies and within 6 months from the date of the final domestic decision. It considered it contrary to Article 26 were one to adopt the view that an application alleging a violation of Article 5(3) is related to a situation and not to an isolated act; for under such a doctrine it would be enough for the person concerned to have exhausted the domestic remedies immediately after the beginning of his detention on remand in order to be entitled to question the legality of the whole period of detention by applying to the Commission. This would prevent the responding State from remedying under its domestic law a supposed violation of Article 5(3) which might very well have occurred only after lodging of the application. This result, the Government claimed, would be contrary to a rule of customary international law of which Article 26 is only a reproduction. It insisted that the time factor was of capital importance for the determination of the subject of the dispute which was not so much a continuing situation as a definite fact, namely the length of the detention which in itself complied with Article 5(1)(c) of the Convention. The Government did not believe that its interpretation of Articles 26 and 5(3) would oblige a person to introduce a series of successive applications. He should apply to the Commission when he considered that he had been in detention too long. He would be successful if that were the case; otherwise the application would be rejected on the ground that the applicant was complaining of a violation which had not yet occurred. The Government claimed that the Commission’s decision on admissibility was subject to review by the Court. It admitted that it had not raised before the Commission the objection based upon Article 26 but that neither a rule forbidding the introduction of new matter nor any rule of an obligation to raise certain matters at the beginning of the proceedings was to apply in the present situation. It asked the Court to declare that the length of detention of the applicant was not in conflict with the obligations of the Convention and, in case it should hold that
of the period of detention to be examined and the relevance of Article 26 of the Convention in the case.\textsuperscript{221}

The Court, in its judgment of November 10, 1969, rejected the Government's contention that only the detention on remand up to the lodging of the application with the Commission can be counted in determining whether the detention went beyond a reasonable time as laid down in Article 5(3) of the Convention. It rather followed the Commission's reference\textsuperscript{222} to the reasoning of the Court in the Neumeister case\textsuperscript{223} and besides found that in accordance with national and international practice a Court should be competent to consider facts that occurred during the proceedings and appear only as a mere extension of the facts complained of at the outset. Thus, courts deciding about release from detention on remand take their decisions in the light of the situation which exists at the time of their decision and international judicial bodies have often granted compensation for damage resulting from an illegal act of a State that was suffered by the applicant party after the institution of international proceedings.\textsuperscript{224}

The Court examined the Government's contentions as to Article 26 of the Convention relating to the rule of prior exhaustion of domestic remedies. It noted that the Government did not rely on

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\item[\textsuperscript{221}] There was a violation, to indicate the point of time when this violation commenced. \textit{Id.} at 34-38.
\item[\textsuperscript{222}] The counter arguments of the Commission as to the time of detention on remand to be considered and as to the importance of Article 26 of the Convention ran this way. It agreed that the detention from March 3 to April 21, 1958, could not be taken into consideration as the Convention entered into force for Austria on September 3, 1958. The Government's claim that the present case could deal with the detention from August 25, 1961 only up to the lodging of the application on August 1, 1962, the Commission rejected by reference to the Neumeister judgment in which the Court had rejected a similar objection. \textit{Id.} at 32.
\item[\textsuperscript{223}] As to the argument based upon Article 26 the Commission's Delegates pointed out that the applicant was released on August 26, 1963, \textit{i.e.}, before the Commission's decision on October 1, 1964 on admissibility; that the Government at that time had not raised any objection based upon Articles 26 and 27(3) of the Convention; that before the admission decision of October 1, 1964, the applicant had on two occasions asked to be released and had exhausted all domestic remedies as to these requests; that, though Austrian law does not limit the number and frequencies of such requests the Commission could not accept the Government's contention as to the necessity of such repetition which would likely be considered as an obstruction of the proceedings or even as an abuse of the right to appeal. It requested the Court to decide whether the Convention had been violated by the applicant's detention from August 25, 1961 to August 26, 1963. \textit{Id.} at 32, 33.
\item[\textsuperscript{224}] \textit{Id.} at 41; text accompanying note 206 \textit{supra}.
\item[\textsuperscript{206}] \textit{Id.} at 41.
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this provision before the Commission but, on the contrary, during the whole proceedings before the Commission considered the period of detention between the lodging of the application and the release of the applicant. The Court, however, did not hold the Government estopped to assert this position, although it had not been proposed before the Commission. It noted further that the application was admitted by the Commission on October 1, 1964; that this decision had not been contested; that, however, the Government claimed that Article 27 also prevents the organs mentioned in Article 19, the Commission and the Court from handling subsequent facts as to which there was no exhaustion of domestic remedies. Yet, the Court stated, international law to which Article 26 refers explicitly only imposes the use of remedies which are not only available, but are also sufficient to redress the complaint.\textsuperscript{225} The question of detention on remand is to be answered in light of the circumstances whether and to what extent, pursuant to Article 26, the detained applicant, who has exhausted the domestic remedies before the Commission declared his application admissible, must make later appeals to the domestic courts so as to make it possible to examine, on the international level, the reasonableness of his continued detention. Yet, the Court concluded, that the whole question of Article 26 arises only if the examination by the Court had not led to the result that at the date of the lodging of the application the detention had exceeded a reasonable time. On the other hand, the detention on remand, held to have exceeded a reasonable time on that day, must as a rule necessarily be found excessive throughout the time for which it was continued. The Court decided, after a thorough analysis of the facts, that on the day of lodging the application, August 1, 1962, the detention exceeded a reasonable time. Consequently, the Court said, there was no need to examine separately the applicant's complaints concerning the detention beyond this point of time.\textsuperscript{226} In its judgment, the Court held unanimously that there had been a breach of Article 5(3) of the Convention and reserved for the applicant the right, should the occasion arise, to apply for just satisfaction.\textsuperscript{227}

Judge Verdross, the elected judge of Austrian nationality,\textsuperscript{228} together with Judge Bilge filed a separate concurring opinion. Accord-

\textsuperscript{225} Id. at 42.
\textsuperscript{226} Id. at 41-45.
\textsuperscript{227} Id. at 45.
\textsuperscript{228} Id. at 4. Judge Verdross sat \textit{ex officio} by virtue of Article 43.
ing to them the rule of exhaustion of domestic remedies is a preliminary question relating principally to the admissibility of the application which, on its side, is a prerequisite for the jurisdiction of the Court if one reads Article 48 together with Articles 26, 27(3), 28, 32, 45, and 47 of the Convention. They believe that according to the text of Article 26 the question of exhaustion of domestic remedies must be previously raised before the Commission. The Government had not done so. Under the division of the tasks and powers between the Commission and the Court in the general plan of the Convention it is not open to the Court to entertain the question of exhaustion of domestic remedies which has not been previously submitted to the Commission.\(^2\)

The case is on the one side a clear confirmation of the Neumeister doctrine to consider also as to reasonableness that period of a detention on remand which lies after the lodging of the application with the Commission. On the other hand, the Court has spoken only a form of dictum as to the question of dealing with the exhaustion of domestic remedies for that period of detention for the reason that it had already reached the decision that the detention on remand had been excessive. In two later cases the Court had occasion to meet this issue more squarely.\(^2\)\(^3\) The reservation in the judgment for the applicant of his right to apply for just satisfaction is an innovation as compared with the judgment in the Neumeister Case which only stated that there had been a violation.\(^2\)\(^3\) Rule 47 \textit{bis} of the Rules of Court and the new text of Rule 50(3) cannot have been the reason for this express pronouncement as both were adopted only on November 8, 1972.\(^2\)\(^3\)

G. Matznetter Case

The judgment in the Matznetter Case\(^2\)\(^3\)\(^3\) was rendered on the same day as in the Stöglmüller Case, November 10, 1969, and by the same Chamber of the Court, composed of the same Judges. The case originated in an application against the Republic of Austria lodged

\(^2\) Id. at 46, 47.

\(^3\) Text accompanying note 202 \textit{supra}.

\(^2\)\(^3\)\(^3\) COLLECTED TEXTS, \textit{supra} note 78, at 419-21.

by Matznetter with the Commission on April 3, 1964. Both the Commission and the Austrian Government brought the case before the Court within the time provided on July 13 and August 8, 1967, respectively.\(^2\)

The involved facts can for the purpose of examining the procedural aspects of the case be condensed as follows. The Court was called upon to decide whether Articles 5(3) and 5(4) in connection with Article 6(1) of the Convention had been violated by the Austrian authorities.\(^3\) Matznetter had been active, in a leading capacity, in a group of enterprises, the so-called Schiwitz Group, which dealt in cereals, flour, animal foodstuffs, etc. On May 13 and 15, 1963, the Economic Branch of the Vienna police asked the Regional Criminal Court in Vienna for an order of arrest against several persons, among them the applicant who was suspected of having abetted the others in the crime of aggravated fraud. On May 14 and 15, 1963, the Public Prosecutor's Office applied to the Court for the opening of a preliminary investigation and also the immediate arrest of the persons indicated by the police. The Investigating Judge granted these applications immediately. In his warrants of arrest, the judge cited danger of absconding, danger of suppression of evidence and danger of repetition of offenses. The applicant was arrested on May 15, 1963.\(^3\)

On December 27, 1963, the applicant made his first application for release, which was refused by the Investigating Judge on January 17, 1964. The applicant's appeal of January 28, 1964, was dismissed by the Judges' Chamber of the Regional Criminal Court of Vienna on February 10, 1974. A further appeal against this decision was rejected by the Court of Appeal on March 4, 1964, which adopted the conclusion of the Investigating Judge and the Judges' Chamber that danger of absconding and of repetition of offenses persisted.\(^4\)

Shortly afterwards the applicant approached the Commission.\(^3\) On November 13, 1964, the applicant applied again for release, offering bail and citing in his favor Articles 5(3) and 6(2) of the Convention. The Investigating Judge without pronouncing his own decision or opinion handed the appeal to the Judges' Chamber which dismissed the application.\(^3\)

\(^{21}\) Id. at 22, 36.
\(^{22}\) Id. at 8, 9.
\(^{23}\) Id. at 9-12, 14.
\(^{24}\) Text accompanying note 234 supra.
the application on December 3, 1964. It considered the danger of absconding and that of repetition of offenses as continuing the latter danger, making it superfluous to examine the guarantee proffered. Again the applicant lodged a further appeal on December 14, 1964. The Court of Appeal refused this appeal on January 20, 1965, adopting the conclusions of the Judges' Chamber. In the meantime the Commission had on December 16, 1964, declared the application admissible. On April 21, 1965, the applicant applied again for release on bail, this time without offering guarantees. He referred to the admission of his application by the Commission and added the assertion that he was sick and that further life in prison would endanger his life. On the basis of a report of the Institute of Forensic Medicine of the University of Vienna, the Judges' Chamber ordered the applicant's release on parole on July 8, 1965. It followed the applicant's assertion that by then the danger of repetition of offenses had ceased—in part because of his serious illness—and also that there was no longer any danger of absconding, especially on the basis of the medical report according to which the applicant appeared unfit to serve sentence in case of conviction and therefore there were no special grounds why he should abscond. He was released on the same day. In the various proceedings before the Judges' Chamber and the Court of Appeals regarding the applicant's release the Austrian Code of Criminal Procedure was followed; the decisions were reached after hearings not open to the public in the course of which the Public Prosecutor's Office had been heard in the absence of the applicant and his lawyer.

After the preliminary investigation had been closed on May 11, 1965, the very voluminous records were studied by the Public Prosecutor, who submitted his indictment of more than 350 pages to the Regional Criminal Court on April 13, 1966. The various acts of fraud for which the applicant was indicted had caused damages of more than 83 million schillings. The Regional Criminal Court found him guilty on February 6, 1967, of various forms of aggravated fraud and sentenced him to 7 years' severe imprisonment and to a fine of 5,000 schillings. The period of the applicant's detention on remand was counted as part of the sentence. The Supreme Court dismissed the

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239 Id. at 14, 16, 22.
240 Id. 17-18.
241 Id. at 19.
applicant's plea in nullity in 1969, but allowed his appeal in part and consequently reduced the sentence to 6 years.242

In his application of April 3, 1964, to the Commission the applicant complained of the decision of the Judges' Chamber of February 10, 1964, and of the Court of Appeal of March 4, 1964. He claimed two violations of the Convention: first, of Article 6(1) and (2) and Article 5(3) by the Court's not hearing him "within a reasonable time," holding him in detention longer than reasonable, and not relieving him "pending trial;" and second, of Article 5(4), by the hearings about release not being conducted in the presence of both parties. The Commission examined the first complaint in the light of Article 5(3) alone, the second in the light of Article 5(4) and 6(1). It declared the application admissible and reported to the Committee of Ministers of the Council of Europe on June 28, 1967. The Commission found that the applicant's detention had exceeded a "reasonable time" and that the release proceedings had been in conformity with Article 5(4) and 6(1).243

The Court dealt in its judgment of December 10, 1969, first with the question of a violation of Article 5(3) of the Convention by the detention of the applicant beyond a reasonable time. As to the procedural part of this issue, namely, the Government's contention that only the detention up to the lodging of the application with the Commission (April 3, 1964) or only up to the last final domestic denial of release before that date (March 4, 1964) should be considered,244 the Court referred to the reasons given in judgment in the

242 Id. at 19-22.
243 Id. 22, 23.
244 The arguments of the Commission and of the Government before the Court as to questions of procedure were these: The Commission argued that the total period of detention, i.e., from May 15, 1963 to July 8, 1965, was to be considered as to its compatibility with Article 5(3) of the Convention, while the Government claimed that the Commission could consider only the period up to the lodging of the application with the Commission, i.e., from May 15, 1963 to April 3, 1964. Id. at 25, 28. The Government insisted on this viewpoint in spite of the contrary ruling of the Court in the Neumeister Case. The Commission countered by pointing out that this question concerned the competence of both the Court and of the Commission and should therefore have been raised before the Commission. It also referred to the Court's judgment of March 20, 1962, in the De Becker Case where the Court had taken into consideration a matter—the Belgian Act of June 30, 1961—which was subsequent to the original application of De Becker, to the adoption of the Commission's Report and even to the commencement of the proceedings before the Court. Id. at 25. The Government considered that judgment as not relevant for the present case, which differed from the situation of which De Becker complained, as the situation of a person in detention on remand was not of a permanent nature but varied from second to second until his release. Id. at 25, 28. Without disputing
Neumeister Case. The Court found, moreover, that it is in accordance with national and international practice that a court should find itself competent to examine facts occurring during the proceedings and which constitute a mere extension of the facts complained of at the outset; that international judicial bodies have frequently

the admissibility of the application, the Government relied strongly on Article 26 of the Convention claiming that it prevented the Commission from dealing with facts with regard to which the domestic remedies had not been exhausted before the lodging of the application. It considered the "matter" referred to in Article 26 to be the length of the detention on remand prior to the lodging of the application while the subsequent period had not given rise to domestic remedies, the refusal of which might have caused the applicant to lodge one or more new applications. The Commission, the Government claimed, relied mistakenly only on the English text of Article 26 ("deal with") without finding a solution which was compatible with the French text ("être saisie"); the only way of reconciling the two texts should be to base one's interpretation on the French text, especially as Article 26 merely confirmed a traditional rule of international law. The Government admitted that its arguments based on Article 26 led logically to the conclusion that the period of detention to be examined did not extend beyond March 4, 1964, the date of the last decision (by the Court of Appeals) prior to the lodging of the application. It also conceded that it had not raised the question of the period to be considered in the proceedings before the Commission; yet it considered this point harmless as this attitude did not imply that the Government accepted that the examination should relate to the whole period of the applicant's detention but was only a sign of the generous spirit of cooperation by which the Government was inspired when it drew up a complete information from which the Commission could learn the progress of the Court's proceedings against the applicant. Id. at 28, 29.

The Commission replied with regard to Article 26 of the Convention that the applicant had the right to apply to the Commission before exhausting the domestic remedies provided this condition has been fulfilled when the Commission decides on the admissibility of the application. The applicant applied April 3, 1964, id. at 4, and the Commission admitted the application on December 16, 1964, id. at 25. It claimed that both the English text and the purpose of the rule of exhaustion of domestic remedies supported this opinion; that the words "deal with" and "être saisie" related to the consideration of the merits of the case which could not be undertaken before exhaustion of the domestic remedies but that this did not prevent the Commission from taking into account facts subsequent to the application which could very well speak in favor of a government concerned if in the meantime the measures taken had satisfied the demands of the applicant. The words in Article 27(3) of the Convention, "[t]he Commission shall reject any petition referred to it which it considers inadmissible under Article 26," implied that the Commission must be satisfied as to the admissibility of the application which necessarily presumed that an application had been lodged. Although Article 26 referred to "the generally recognized rules of international law," there was no complete parallelism between the doctrine of diplomatic protection and the new system inaugurated by the Convention, at least in regard to applications by private persons. It reminded the Court that in the present case the domestic remedies with respect to the applicant's first demand of release were exhausted with the Appeal Court's decision of March 4, 1964, i.e., a few weeks before lodging the application with the Commission and several months before the Commission's decision about the admissibility. The Commission doubted whether demands after a long period of detention on remand amounted to true domestic remedies in the meaning of Article 26. Id. at 25, 26.

24 Id. at 31; see text accompanying note 209 supra.
held that compensation for damage resulting from an illegal act of a state must also cover damage suffered after institution of the international proceedings; that matters of detention on remand are typically of this nature. As to the Government's argument based upon Article 26 of the Convention, the Court followed the position taken in the Stögmüller Case that it would not refuse to consider this argument for the mere reason that quite clearly it had not been presented by the Government in the proceedings before the Commission and accepted it to the extent indicated in the Stögmüller judgment. However, the examination as to the merits in the Matznetter Case did not lead to the result that the detention on remand had exceeded a "reasonable time" already on the day of lodging the application to the Commission. Therefore, before examining the latter detention the Court ascertained whether the continuation of the detention was due to any failure of the applicant to make further requests to the Austrian judicial authorities. The Court came to the conclusion that up to the time of making the successful requests for release the rule of exhaustion of domestic remedies was observed. The Court then extended its examination of the merits to the detention up to the very release of the applicant on July 8, 1965, and found by five votes to two that there had been no breach of Article 5(3) of the Convention.

As to the issue of "equality of arms" in the examination of requests for release, the Court referred to its decision as to this point in the Neumeister Case and held unanimously that there had been no breach of Article 5(4) and 6(1) of the Convention.

Of the various concurring or dissenting opinions of individual

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247 Id. at 32-36.
248 With regard to the violation of Articles 5(4) and 6(1) of the Convention asserted by the applicant for the reason that the hearings on the release were not held in the presence of both parties both the Commission and the Government referred to the judgment of the Neumeister Case. Id. at 30. As to the judgment in the Neumeister Case see text accompanying note 209 supra. The Commission requested the Court to dismiss the claim of violation of Article 5(4) and to determine whether the applicant's detention on remand from May 15, 1963 to July 8, 1965, was or was not consistent with Article 5(3) of the Convention. The Government asked the Court to declare that the measures taken by the Austrian authorities did not conflict with the obligations arising from the Convention. Matznetter Case, [1969] 10 Eur. Ct. Human Rights 30.
249 Id. at 35, 36.
Judges only one deals with procedural matters, the concurring opinion of Judges Verdross and Bilge.\textsuperscript{251} According to them the Court should not consider the arguments regarding exhaustion of domestic remedies which were raised by the Austrian Government before the Court but not before the Commission. Though admitting the broadness of the text of Article 45 of the Convention concerning the Court’s jurisdiction they refer to Articles 47, 28, 26, and 27(3) for the real and somewhat more restricted meaning of Article 45. They find competence to accept an application and to check its admissibility only in the Commission and therefore believe that the Court may not entertain a question of exhaustion of domestic remedies not previously submitted to the Commission.\textsuperscript{252}

The Matznetter judgment is a confirmation and extension of principles established in previous judgments as to the question of exhaustion of domestic remedies. The opinion of Judges Verdross and Bilge seems well founded. Yet the attitude of the Court not to be deterred from examining this problem only because it had not been raised before the Commission is more satisfactory. These are not proceedings depending on the procedural correctness of the pleadings by the “parties.” Rather the Court rightly takes an investigatory attitude under which it is supposed to find and consider facts independently from the pleadings.

H. Delcourt Case

The main issue of the Delcourt Case\textsuperscript{253} is one of procedure in the State Court of Cassation, not in the European Court of Human Rights. Yet it is closely related to a question of procedure of the latter Court, namely its jurisdiction to deal with the procedure in state cassation proceedings, and is of fundamental importance as to any kind of judicial procedure. The Delcourt Case originated with an application lodged by Emile Delcourt, a Belgian national, with the Commission on December 20, 1965, against the Kingdom of Belgium.\textsuperscript{254} The Commission referred the case to the Court within the time prescribed in Article 32(1), 47 of the Convention on Febru-

\textsuperscript{251} Judge Verdross, an Austrian, was sitting \textit{ex officio} according to Article 43.


The applicant was, at the time of lodging his application with the Commission, in prison at Louvain. After the Procureur du Roi at Bruges had instituted proceedings against him for obtaining money by menaces, fraud and fraudulent conversion, he was arrested on November 23, 1963, and later charged with various offenses of a character similar to those advanced by the Procureur du Roi. On September 21, 1964, he was convicted by the Bruges Court of Summary Jurisdiction of 36 out of 41 counts and sentenced to 1 year's imprisonment and a fine of 2,000 Belgian francs. Upon his and the prosecution's appeal, the Court of Appeal in Ghent found all charges to be established, including those of which the applicant had been acquitted in first instance and it increased the principal sentence to 5 years' imprisonment and further decided that on serving his sentence he should be placed at the disposal of the Government for 10 years. The applicant appealed further to the Court of Cassation and lodged a Memorial with that court. The Procureur Général's department (parquet) at the Court of Appeal did not avail itself of this right to file a counter-memorial. At the public hearing of the Court of Cassation on June 21, 1965, the applicant was present but his counsel was not. After hearing the report of one judge and the submission of the Avocat Général to the effect that the appeal be dismissed, the Court of Cassation dismissed the appeal on the same day after private deliberation.

The Avocat Général was present at these deliberations in accordance with a Decree of March 15, 1815, which provides "... in cassation proceedings the Procureur Général has the right to be present, without voting, when the Court retires to consider its decision." The applicant complained of the three judgments rendered against him and alleged a violation of Articles 5, 6, 7, and 14 of the Convention. His complaints were declared inadmissible by the Commission except for the one relating to the question of whether the presence of a member of the Procureur Général's department at the deliberations of the Court of Cassation was compatible with the principle of "equality of arms" of Article 6(1) of the Convention. Later on, in observations to the Commission of December 8, 1967,
the applicant further complained that he had not been able to reply to the submissions of the Procureur Général's department at the Court of Cassation, that he had not been informed of this submission before the hearing of June 21, 1965, nor had the right to the last word at the hearing been given to him. The Commission expressed in its Report, by seven votes against six, the opinion that Article 6(1) of the Convention was not violated in the present case.258

The Court stated in its judgment of January 17, 1970, that Article 6(1) orders that "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." It examined this provision under three viewpoints: first, whether it is applicable at all; second, whether there was a violation of it according to the principal complaint of the applicant, referring to the participation of a member of the Procureur Général's department in the deliberations of the Court of Cassation on June 21, 1965; and finally, whether there was a violation according to the "new" complaints of the applicant—that he could not reply to the Procureur Général's final submissions because they were not communicated to him before and that he did not have the right to say the last word at the hearings on June 21, 1965.259

As to the first point, following the opinion of the Commission,260

258 Id. at 7, 8.
259 Id. at 12, 15, 19.
260 In arguing the case before the Court the Commission pleaded that Article 6(1) of the Convention is applicable to the proceedings in cassation. Its majority, however, saw no violation of this article in the presence of a member of the Procureur Général's department attached to the Court of Cassation at that Court's deliberations. The Court does not deal with the merits of cases; save in certain exceptional cases irrelevant here, its sole function is the decision of questions of law and the Procureur Général's department only assists the Court in the exercise of this function. The department does not ordinarily prosecute and does not have the character of a party. In almost all cases it is completely independent of the Minister of Justice and has no right of direction of the Procureur Général's department attached to the lower courts which is the prosecuting authority in normal cases. For all these reasons the participation of the Procureur Général's department at the deliberation of the Court of Cassation did not conflict with the principle of "equality of arms." The Commission did not express an opinion on the "new" complaints of the applicant which, in its opinion, were only presented as special aspects of the principle of "equality of arms." The Commission asked the Court to decide whether there was a violation of Article 6(1) of the Convention in so far as this provision requires a fair trial, by reason of the participation of the Representatives of the Procureur Général's department in the deliberations of the Court of Cassation. Id. at 9, 10.
the Court rejected the Government's viewpoint\textsuperscript{281} that where the Court of Cassation gives judgment on an appeal in cassation by one of the parties challenging a judicial decision, it does not make a determination either of civil rights or obligations or of a criminal charge within the meaning of Article 6(1) of the Convention. Recognizing the difficulty of defining exactly the field of application of Article 6(1), the Court called attention to some of its former decisions concerning the question. It referred to its ruling in the\textit{Neumeister and Matznetter Cases}\textsuperscript{282} that Article 6(1) does not apply to the procedure which regulates in Austria the examination of applications for provisional release. It recalled that it considered but

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\item The Government argued that Article 6(1) of the Convention is not applicable in the present case to the proceedings in cassation and that, in any case, the fact that a member of the Procureur Général's department at the Court of Cassation, after submitting in an open court that the applicant's appeal should be dismissed, was present in a consultative capacity at the deliberations of that court, did not violate Article 6(1). Elaborating on the arguments of the Commission it explained that the Court of Cassation, in spite of its judicial nature, fulfilled a function which has some relation to the work of the legislature, that it was established in the interest of the law itself and judges judgments, not persons (except for some matters irrelevant to the present case). It is not its function to decide disputes concerning civil rights and obligations or to determine criminal charges within the meaning of Article 6(1) of the Convention. The Government emphasized that the Procureur Général's department at the Court of Cassation must be distinguished fundamentally from the Procureur Général's department attached to the Courts below; in the very rare cases where under the relevant law the department assumes the position of a party and institutes prosecution the Procureur Général is not present at the deliberation. As the Procureur Général is not concerned with the question of guilt of the accused, he is neither their adversary nor the tool of the prosecution. Statistics show that often he submits to the Court of Cassation that an appeal in cassation brought by the Procureur Général's department at the Court of Appeal should be dismissed or puts forward on his own initiative grounds for setting aside a conviction; therefore, the Procureur Général's department at the Court of Cassation is not in alliance with that attached to the courts below. The former one exercises, in practice, over the latter one supervision of a purely doctrinal and scientific nature without any power of direction, and it is entirely independent in its relations with the Minister of Justice. The Government characterized the position of the Procureur Général attached to the Court of Cassation as part of the Court, to be identified with it like the judges. It felt, therefore, that the procedure attacked by the applicant did not upset the "equality of arms;" any inequality in this case rather worked to the applicant's advantage, for unlike the applicant, the Procureur Général's departments attached to the lower courts did not have an opportunity to put forward their arguments in open court before the Court of Cassation and did not even avail themselves of their right to reply in writing to the memorial of the applicant to the Court of Cassation. The Government called attention to the fact that the procedural provision in dispute is more than a century and a half old and had never been criticized but, on the contrary, had been explicitly maintained by Parliament, once without change (1949) and the second time in substance (1967) and after examination of the question from the viewpoint of the Convention. \textit{Id.} at 10, 11.

\item \textit{Id.} at 13. See text accompanying notes 209 and 250 \textit{supra}.
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did not find it necessary to decide in the *Wemhoff* and *Neumeister* Cases the question whether cassation proceedings ought to be taken into account in appreciating the duration of a hearing for the purpose of applying the provision of Article 6(1) which requires a hearing within a reasonable time. The Government invoked the provision of the Belgian Constitution that the Court of Cassation "does not deal with the merits of the cases submitted to it" as showing that there is not, strictly speaking, a prosecution or a defense before the Court and that the Court judges not persons, but judgments, and therefore does not determine criminal charges as required by Article 6(1) of the Convention. The Court, however, pointed out that judicial decisions always affect persons. Especially in criminal matters, accused persons do not disappear with an appeal in cassation; this is true because the confirming or quashing of the lower court's decision—the only way in which the Court of Cassation can act—may influence the accused person's position, changing his status as a convicted or an acquitted person provisionally if a lower decision is set aside and the case is referred back to trial court or with final effect if the appeal in cessation fails or if the Court of Cassation decides without sending the case back that the facts that lead to the conviction do not constitute an offense of any law. Contemplating the French text of Article 6(1) "bien-fondé de toute accusation" the Court interpreted it as referring not only to the accusation being well-founded in fact, but also in law, which may lead the Court of Cassation to hold that the lower courts when considering the facts have acted in breach either of criminal law or of essential forms of procedure. Thus, even the literal interpretation by the Government of Article 6(1) cannot, in the view of the Court, put the proceedings in cassation completely outside its scope. Examining the much broader English text of that Article ("determination of . . . any criminal charge"), the Court again concluded that a criminal charge is not really "determined" as long as the verdict of acquittal or conviction has not become final and that the proceedings in cassation are one special stage of the proceedings whose consequence may prove decisive for the accused and which, therefore, cannot fall outside the scope of Article 6(1). Admitting

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that the Convention does not oblige the Contracting States to set up courts of appeal or of cassation, it found that once such courts are instituted they must insure that the persons before them enjoy the fundamental guarantees of Articles 6.264

Having established that Article 6(1) is applicable to proceedings in cassation the Court proceeded to the second point, i.e., whether the special features of these proceedings in the case before it violate that Article. The Court acknowledged that the presence of a member of the Procureur Général’s department attached to the Court of Cassation at the deliberations of this Court after he had made his submission in open court conforms with the legislation of Belgium in force at that time, namely with Article 39 of a Decree of March 15, 1815. The question before the Court was therefore the compatibility of that article with Article 6(1) of the Convention. While the Commission and the Government dealt with the problem mainly as one of “equality of arms,” the Court examined it by reference to the whole of Article 6(1) whose contents, the Court declared, is not exhausted by that principle in which the Court saw it as only one feature of the wider concept of fair trial by an independent and impartial tribunal.265 It examined the positions of the various departments of the Procureur Général and found that the respondent party to the applicant’s appeal in cassation was not the department at the Court of Cassation but those at the lower courts. As to them the Court found that the applicant did not suffer from any discrimination as to the full equality of treatment; that the departments of the lower courts had not availed themselves of their right to reply in writing to the applicant’s memorial in cassation; and that the relevant legislation did not even permit them to appear at the hearing before the Court of Cassation or to be present at its deliberations. As to the department of the Procureur Général at the Court of Cassation the Court found that in general it did not conduct public prosecutions nor bring cases before that court nor did it have the character of a respondent and therefore “cannot be considered as a party.”266 Yet, the Court considered necessary a more careful examination of the real position and functions of the Procureur Général’s department attached to the Court of Cassation. It admitted that a clear distinction between the department at the Court of

265 Id. at 15.
266 Id. at 15, 16.
Cassation and those at the lower courts is not always very evident from the legislative text as often the same names such as Procureur Général's department (Ministère Public), are used. All the departments seem to constitute, in certain aspects, one single corps; moreover, certain legislative texts provide that the Procureur Général at the Court of Cassation shall exercise supervision over the Procureurs Généraux attached to the Court of Appeal, which power, according to an examination of the practice, does not involve the power to intervene in the conduct of individual cases but merely to give general opinions on matters of doctrine. In addition, the Court conceded, the Procureur Général's department at the Court of Cassation sometimes does act as a moving party, for example in disciplinary proceedings against judges, and its members are sometimes recruited from among the members of the lower departments so that some litigants may view as an adversary a Procureur Général who submits that their appeal in cassation should be dismissed and that a litigant could have a feeling of inequality if after such a submission such member withdraws with the judges to attend the deliberation in privacy. The Court stated that the Belgian legislation to the last point does not seem to have any equivalent, at least in criminal cases, in the other member States of the Council of Europe and that the Avocat General of the Court of Justice of the European Communities—in spite of some analogies—does not take part in the deliberations.

Though recognizing the axiom that justice must not only be done but also must be seen to be done, the Court did not see, when looking at the realities behind the appearances in the preceding considerations, enough proof of a violation of the right to a fair hearing. The Procureur Général's department at the Court of Cassation is—except in matters not relevant here—indeed independent of the Minister of Justice, who cannot compel him to make his submissions one way or the other while he has the power to direct the institution of proceedings by the lower Procureurs Généraux. The Procureur Général at the Court of Cassation exercises supervision over the lower Procureurs only with regard to doctrine without giving them instructions or injunctions. Nor is he the virtual adversary in cassation of the accused, even when he submits in open court that the appellant's argument should not be accepted. The Court also admitted that the officers of the lower departments do not have the character of public accusers as they are bound to serve in all objectivity and thus are to be considered parties only in the formal proce-
dural meaning of the term. Still, the Court said, their task is, before all else, to investigate and prosecute criminal offenses, while the Procureur Général at the Court of Cassation upholds a different interest, the one concerned with the observance by the judges of the law and not with the establishment of guilt or innocence of the accused, a position held by him also in civil matters where nobody could ever seriously suggest that he becomes the opponent of a litigant with whose case his submissions do not agree. In practice, the Court said, the Procureur Général's department at the Court of Cassation is that of an adjunct and advisor of the court; he discharges a quasijudicial function by assisting the court through his opinions given according to his legal conscience to supervise the lawfulness of the decision attacked and to insure the uniformity of judicial precedent. The Court referred to statistics according to which the Procureur Général's department at the Court of Cassation frequently either submits that appeals by the lower departments against an acquittal should be dismissed, that appeals by convicted persons should be allowed, or even raises ex officio grounds which a convicted person has not put forward in an adequate way. It denied that the Court of Cassation's independence and impartiality could be affected by the presence of a member of the Procureur Général's department at its deliberations after the Procureur Général himself had been shown to be independent and impartial. Finally, the Court emphasized that the challenged system dates back for more than a century and a half; though such a longstanding domestic legal rule could not justify a failure to comply with the present requirements of international law, the Court thought that it might provide supporting evidence that there has been no such failure. The Court believed that this was the case, especially since the system has been maintained twice by a parliament chosen in free elections, the second time after studying the question in the context of the Convention, and as, furthermore, it appeared that the system has never been questioned by the legal profession or public opinion in Belgium. Therefore, the Court concluded that the challenged system as applied in practice was not incompatible with Article 6(1) of the Convention; it also found that in the case at court there were no grounds for holding that the Procureur Général's department at the Court of Cassation failed to observe, to the applicant's detriment, its duty to be impartial and independent at the hearing or at the
deliberations.\textsuperscript{287}

Regarding the third point (the "new complaints" of the applicant),\textsuperscript{288} the Court did not accept the Government's view that these "new complaints" were not admissible for the reason that they had not been raised before the examination of the merits of the case by the Commission.\textsuperscript{289} Though not mentioned explicitly in the application or the first memorials of the applicant, those complaints had an evident connection with those contained therein, namely the violation of Article 6(1) through the role of a member of the Procureur Général's department at the Court of Cassation, the subject of the original application as accepted by the Commission. The Court, therefore, thought it would be unduly formalistic and unjustified not to take these elements into account. However, the Court rejected the new complaints as ill-founded. It considered the expression of the Procureur Général's department at the end of the hearing without prior communication of it to the parties as in the very nature of the department's task with regard to the principal complaint. It stated that Article 6 of the Convention does not require, even by implication, that an accused should have the possibility of replying to the purely legal submissions of an independent official attached to the highest court in Belgium as its assistant and advisor. The Court held unanimously that there had been no violation of Article 6(1).\textsuperscript{270}

The Court's judgment to points one and three seems perfectly justified. It is important that the Court cleared up in the affirmative the question of whether Article 6(1) of the Convention is applicable to proceedings in cassation. While seemingly only questions of law are resolved in the abstract, the Court rightly looked at the effect and concluded that judicial decisions always affect persons and do amount, in criminal matters, to a determination of a criminal charge in the meaning of Article 6(1). The Court also showed practical common sense when it refused to reject the examination of the

\textsuperscript{287} Id. at 15-19.
\textsuperscript{288} Text accompanying note 259 supra.
\textsuperscript{289} The Government considered the "new" complaints as inadmissible because not included in the original application and, in any event, as unsustainable, for it is because the Proceureur Général's department is not a party that its submissions are made at the end of the oral proceedings without being communicated in advance to the parties. Delcourt Case, [1970] 11 Eur. Ct. Human Rights 11. It asked the Court to hold that the procedure in dispute did not violate Article 6(1) of the Convention. Id. at 12.
\textsuperscript{270} Id. at 19, 20.
“new complaints” only for the reason that they had not been spelled out clearly in the applicant’s first application and its supplements.

As to the main point, however, the decision appears unsatisfactory. The Court in a way confirmed that the challenged proceedings are “unusual” by stating that they seem to be unique among criminal cases in the Member States of the Council of Europe and to this it may be added that they appear unique also beyond this group of countries. Once the Court had not rejected the axiom that “justice must not only be done, it must also be seen to be done,” the same principle that prevails in questions of recusations of judges, it is difficult to see how it could not consider it a violation of this axiom in the challenged proceedings. No degree of emphasis on the quality of the Procureur Général at the Court of Cassation as an objective advisor of that court can wipe out at least the appearance that he becomes a party when he is allowed to repeat and possibly reinforce the submission he has made in open court in the privacy of the court’s chambers to which the accused has no access. The argument of the old age of these proceedings deflates rather than enhances the Court’s position, as it puts in the foreground the autocratic atmosphere from which they sprang; also the point that the proceedings in question have apparently never been challenged before can be rebutted by the fact that probably only the Convention and the creation of the Court under it have opened the way for an effective challenge. It seems surprising that no dissenting or at least a concurring opinion discussing these viewpoints has been filed by any member of the Court.

I. Vagrancy Cases

The cases of De Wilde, Ooms and Versyp (Vagrancy Cases) originated from applications lodged in 1966 with the Commission by

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three Belgian nationals concerning certain aspects of the Belgian legislation on vagrancy. After ordering in 1967 the joinder of these

274 Under the Belgian Criminal Code vagrants are persons who have no fixed abode, no means of subsistence and no regular trade or profession. All of these three requirements must be fulfilled cumulatively. Vagrancy is now dealt with in an Act of 1891. Under it every person picked up as a vagrant shall be arrested and brought before the police court composed of a magistrate, where, after ascertaining "the identity, age, physical and mental state and manner of life," the magistrate considers whether the person is a vagrant. Section 13 deals with "able-bodied persons, who, instead of working for their livelihood exploit charity as professional beggars" and those "who through idleness, drunkeness or immorality live in a state of vagrancy." Section 16 deals with "persons found begging or picked up as vagrants when none of the circumstances specified in section 13 . . . apply." In the case of section 13 the court shall place the vagrant at the disposal of the Government to be detained in a vagrancy center for not less than 2 and not more than 7 years; he may be released before the time fixed by the court if the Minister of Justice considers that there is no reason to continue the detention. In the case of section 16 the court may place the person at the disposal of the Government to be detained in an assistance home for an indeterminate period, not to exceed 1 year. Section 13 was applied to De Wilde and Versyp, section 16 to Ooms. The distinction between "vagrancy centers" and "assistance homes" has been practically overcome by a system of individual treatment of persons detained. Magistrates form part of the judiciary and have the status of an officer vested with judicial power with the guarantees of independence. The Belgian Court of Cassation, however, considers the decisions rendered under section 13 and 16 of the 1891 Act as administrative acts and not as judgments and, therefore, not as subject to appeal or to cassation proceedings. The Conseil d'État had dealt only with two appeals for the annulment of detention orders for vagrancy. In the first case (the Vleminckx case) the Conseil d'État held in its judgment of December 21, 1951, that the decision of the police court in pursuance of section 13 of the 1891 Act against which the appeal was brought was only a preliminary decision followed by the Government's decision to detain the applicant in a vagrancy center; the appellant therefore had not established that he had any interest in the amendment of the court's decision which merely allowed the Government to detain him while the actual detention decision of the Government had not been appealed. However, in the Du Bois case the Conseil d'État on June 7, 1967, 2 months after the Commission had declared admissible the applications of De Wilde, Ooms and Versyp, annulled a decision by which the police court had placed the appellant Du Bois at the disposal of the Government in pursuance of section 16 of the 1891 Act. The Conseil d'État considered the police court's decision to be not the finding of a criminal offense but an administrative security measure not open to appeal before the ordinary courts. It is not only a preliminary measure enabling the Government to make the effective decision on the matter of detention, but itself the effective decision placing the person concerned in a different legal position and therefore capable of constituting a grievance, the person concerned being immediately deprived of his liberty. The Belgian Government was preparing, as the Court mentioned, a bill opening the way for an appeal from the magistrate's decisions to the court of first instance. Detained vagrants are required to work and are liable to disciplinary measures if they refuse to do so without good reason. They are entitled to daily wages, part of which are to form release savings which, normally, had to amount to at least 2,000 BF as a prerequisite for release. The minimum hourly allowance, actually paid to detainees was 1.75 BF, later 2 BF. The correspondence of detained vagrants may be subjected to censorship, except with their counsel and with certain authorities and with the Commission. Vagrants detained in an assistance home as Ooms may not be kept against their will for more than 1 year. They regain their freedom as of right before the end of one year if their release savings have reached the minimum amount or the Minister of
applications in so far as they had been declared admissible, the Commission adopted its Report to the Committee of Ministers on July 19, 1969, and sent it to the Committee on September 24, 1969. The Belgian Government referred the cases to the Court on October 24, 1969. The Chamber of the Court entrusted with the case by a unanimous preliminary decision of May 28, 1970, relinquished jurisdiction to the plenary Court. Unlike the Language Case the narration of the events during the preliminary proceedings before the Court as given in the Court's judgment of June 18, 1971, does not reveal that the Belgian Government or the Commission had asked that the jurisdiction be relinquished to the plenary Court. Apparently the Chamber acted \textit{sua sponte} and after referring to Rule 48 of the Rules of Court, gave as a reason that the Commission had raised in a memorial certain questions on which it was desired that the Court should be able to rule in plenary session.

Another preliminary and procedural issue, this time controversial, was dealt with by the Court in its judgment of November 18, 1970. At a hearing on the day before, the Principle Delegate of the Commission announced to the Court that the Delegates intended to avail themselves, according to Rule 29(1) of the Rules of Court, of the assistance of Mr. Magude, a member of the Brussels Bar, who would furnish the Court, under the control and responsibility of the Delegates, fuller explanation on certain points relating to Articles 7

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Justice shall release them if he considers their retention no longer necessary. Vagrants detained in a vagrancy center as De Wilde and Versyp leave it either at the expiration of the period fixed by the court—between 2 and 7 years—or earlier if the Minister of Justice considers that there is no reason for further detention. Accumulation of release savings or other means does not suffice for this purpose. 12 Vagrancy Cases, \textit{supra} note 273, at 24, 25.

\textsuperscript{m} \textit{Id.} at 12, 13.

\textsuperscript{m} \textit{Id.} at 4; see a similar move of a Chamber of the Court in the Language Case, text accompanying notes 142-45 \textit{supra}.

\textsuperscript{m} 12 Vagrancy Cases, \textit{supra} note 273, at 12-14.

\textsuperscript{m} \textit{Id.} at 13, 14.

\textsuperscript{m} \textit{Id.} at 6-10. It is noteworthy that in this judgment Judge Maridakis of Greek nationality took part, although Greece had denounced the Convention on December 12, 1969, and according to Article 65(1) of the Convention, had ceased to be a Party to it on June 13, 1970. [1969] \textit{Y.B. Eur. Conv. on Human Rights} 78-85 (Eur. Comm. on Human Rights); [1970] \textit{Y.B. Eur. Conv. on Human Rights} 4, 26. See note 93 \textit{supra}. Yet, according to Article 40(6) the Members of the Court serve until they are replaced and, even after this, they continue to deal with such cases as they have already under consideration. But see note 290 \textit{infra}.

\textsuperscript{m} 12 Vagrancy Cases, \textit{supra} note 273, at 6, 7. Rule 29(1) of the Rules of Court reads: "The Commission shall delegate one or more of its members to take part in the consideration of the case before the Court. The Delegates may, if they so desire, have the assistance of any person of their choice." \textit{Collected Texts}, \textit{supra} note 78, at 413.
and 6(3) of the Convention. The Belgian Government objected to this on the grounds that the Commission ought to be taken as sufficiently informed on the points in question as it had drawn up its final Report with its findings of fact and that Mr. Maguée had been counsel for the three applicants and that, therefore, the application of Rule 29(1) would defeat Article 44 and the whole spirit of the Convention under which individuals may not plead before the Court. The Court called attention to Rule 37 of the Rules of Court according to which any person appointed by the Delegates according to Rule 29(1) may be called upon to speak in the hearings before the Court; it emphasized that Rule 29(1) does not limit the choice of the Delegates of persons to assist them and therefore does not preclude them from having assistance of the lawyer or former lawyer of an individual applicant. It referred to its judgment of April 7, 1961, in the Lawless Case where it held that the Commission may ask the applicant to nominate a person to be available to the Commission's Delegates but that it did not follow from this that such a person has any locus standi in judicio; it renewed its statements in the judgment of November 14, 1960, in the Lawless Case that the role of such a person is to assist the Delegates of the Commission whose main function is to assist the Court and that, in any event, it is for the Court whose President directs the hearings to insure that the Convention is respected; it underlined that the person assisting the Delegates must only present to the Court explanations on points indicated to him by the Delegates subject to the Delegates' control and responsibility that any situation inconsistent with Article 44 of the Convention be avoided.

The Court took notice of the intention of the Delegates of the Commission to entrust Mr. Maguée with the task of assisting them

281 12 Vagrancy Cases, supra note 287, at 7. For the text of Article 44, see text accompanying note 100 supra.
282 12 Vagrancy Cases, supra note 287, at 7. Rule 37 of the Rules of Court reads: "The President of the Chamber shall direct the hearings. He shall prescribe the order in which the agents or advisors of the Parties and the Delegates of the the Commission as well as any other person appointed by them in accordance with Rule 29(1) shall be called upon to speak." COLLECTED TEXTS, supra note 78, at 416. In proceedings before the plenary court the President of the Court takes over the tasks of the President of the Chamber according to Rule 48(3) which reads: "Any provisions governing the Chambers shall apply, mutatis mutandis, to the proceedings of the plenary Court." Id. at 420.
283 12 Vagrancy Cases, supra note 273, at 7.
284 Id. 7-8; see also note 102 supra.
at the hearing of November 18, 1970, and decided to proceed with the examination of the merits of the case.\footnote{Id. at 8.}

Judge Rolin of Belgian nationality sitting ex officio\footnote{Id. at 13. See Article 43 of the Convention, supra note 25.} filed a concurring opinion in which he expressed that Mr. Maguée could not address the Court "in the name of the Commission" as one Delegate of the Commission appeared to have suggested and that to hear Mr. Maguée can be justified only if he confines himself to those new points raised before the Court on which the Commission considered that it was not sufficiently informed previously and with which therefore it could not deal in its Report.\footnote{Id. at 10. Rule 38(1) of the Rules of Court reads: "The Chamber may, at the request of a Party or of Delegates of the Commission or proprio motu, decide to hear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in carrying out its task." COLLECTED TEXTS, supra note 78, at 416.} A dissenting opinion was filed by Judge Favre. He declared that Rule 29 of the Rules of Court must be interpreted in the light of Article 44 of the Convention according to which only the High Contracting Parties and the Commission can bring a case before the Court; that the Commission's task is to defend that public interest and that therefore it cannot be represented, even in part, by the applicant's lawyer who acts on his behalf and cannot speak at the Court's hearing on behalf of the Commission or in order to submit an opinion different from that of the Commission. Judge Favre thought that the person named by the Commission could be heard by the Court only under Rule 38 of the Rules of Court and that in such a case the Court would say on what facts it desired explanations. He considered the Court's judgment as incompatible with Article 44.\footnote{Id. at 12. Vagrancy Cases, supra note 273, at 9.}

The Court's judgment which follows the trend of its judgments of November 14, 1960 and April 7, 1961, in the \textit{Lawless Case} appears more satisfactory than the minority opinion. It tries to open the way as far as possible to an accurate finding of facts and law.\footnote{12 Vagrancy Cases, supra note 273, at 9.} As long as the statements of a person assisting the Delegates of the Commission are received by the Court only as an assistance and not as a

\footnote{Under this approach also the suggestion in Judge Rolin's concurring opinion that only new points could be touched upon by the assisting person seems unjustified. The Commission could, for example, wish that points on which its own opinion was divided should be cleared up with the help of the assisting person.}
pleading by a person who cannot be a party to the proceedings, there seems to be no conflict with Article 44. The Court could and should rebuke that person as well as the Delegates if that borderline is overstepped. If Rule 29 were in conflict with Article 44 the same could well be claimed with regard to Rule 38.

The main judgment in these cases was rendered on June 18, 1971. The main facts underlying the judgment are these. The applicant De Wilde served for more than seven years in the French Foreign Legion. He drew from French authorities as war disablement and military retirement pension a quarterly sum of 3,217 Belgian Francs (BF) and worked, at least from time to time, as an agricultural laborer. On April 18, 1966, he reported to the police station at Charleroi and declared that he could not find work and had no roof over his head and had no money as the local French Consulate had refused to give him an advance on his next pension payment due on May 6. He added that he had never been dealt with as a vagrant. The deputy superintendent of the police considering De Wilde as in a state of vagrancy put him at the disposal of the local public prosecutor and held him. De Wilde made an attempt to escape but was captured immediately. He disputed the right of

Even before rendering the Judgement of November 18, 1970, as to the procedure, the Court adopted on September 29, 1970, the following resolution:

The Court,
Having regard to Articles 38 and 39 of the Convention and Article 7 of the Statute of the Council of Europe; Finds that, as the withdrawal of Greece from the Council of Europe becomes effective on December 31, 1970, the office for which Mr. Maridakis was elected by the Consultative Assembly on the nomination by the Greek Government cannot continue to operate beyond that date.

The Court considers that if the De Wilde, Ooms and Versyp Cases which are pending before the plenary Court have not been concluded by December 31, 1970, Mr. Maridakis cannot continue to deal with them.

[1970] Y.B. EUR. CONV. ON HUMAN RIGHTS 42 (Eur. Comm. on Human Rights). Judge Maridakis did not participate in the judgment of June 18, 1971. 12 Vagrancy Cases, supra note 273, at 12. While the Judges need not be nationals of a Party to the Convention (see, notes 93, 279 supra), the Court now interpreted Articles 38, 39 of the Convention as demanding that all of its Judges be nationals of the Members of the Council of Europe. Though these articles do not say so expressis verbis this is clearly in the spirit of these provisions. This result is reinforced by the provision of Article 60 according to which the Convention is open for signature only to the Members of the Council of Europe. See note 279 supra. It should be noted that Greece after rejoining the Council of Europe in 1974 again ratified the Convention and Protocols 1, 2, 3, 5 with effect as from November 28, 1974. [1974] Y.B. EUR. CONV. ON HUMAN RIGHTS 2 (Eur. Comm. on Human Rights); [1975] Y.B. EUR. CONV. ON HUMAN RIGHTS 2. In the same year also France and Switzerland, for the first time, joined the Convention. [1974] Y.B. EUR. CONV. ON HUMAN RIGHTS 2-9.
the police to keep him under arrest for 24 hours. An information note solicited by the police indicated that De Wilde had had between 1951 and 1965, 13 convictions by courts of summary jurisdiction or police courts and that contrary to his allegations, he had been placed at the Government's disposal five times as a vagrant. On April 19, 1966, the local police court decided at a public hearing and after giving De Wilde an opportunity to reply that vagrancy was established and according to Section 13 of the Act of November 27, 1891 "for the suppression of vagrancy and begging" (hereinafter referred to as the 1891 Act) placed him at the disposal of the Government to be detained in a vagrancy center for 2 years and directed the public prosecutor to execute the order. He was interned in various institutions, and he was sentenced on August 19, 1966, to 3 months imprisonment for theft from a dwelling house. On May 3, 1966, De Wilde wrote the Commission and on June 17, 1966, he lodged an application with it invoking Articles 3 and 4 of the Convention. He complained of his "arbitrary detention" in the absence of any offense of his part, without any conviction and in spite of his having financial resources. He also protested against "slavery" and "servitude" which, in his opinion, resulted from his being obliged to work for absurdly low wages and under pain of disciplinary action. On May 31 and June 6, 1966, he wrote the Minister of Justice invoking Articles 3 and 4 of the Convention. He mentioned that on May 6 he had received 3,217 BF as pension and wondered why he had not been released; he complained about low wages and about some disciplinary action taken against him. He complained again on June 13 and July 12, 1966. On July 15, the Ministry notified him that his release before expiration of the prescribed period could be considered if his conduct at work was satisfactory and adequate arrangements for rehabilitation had been made. In a further letter of August 8, 1966, De Wilde argued that he had sufficient money from his pension and earnings of more than 4,000 BF and that his detention made rehabilitation impossible; his request was denied by the Ministry on August 12. On August 13, De Wilde announced to the Minister that he could find board, lodging, and work on a farm. On October 25 and 26 the Ministry decided that upon serving the sentence of August 19, De Wilde could be released once his rehabilitation seemed insured by the Social Rehabilitation Office of Charleroi (section 15 of the 1891 Act). De Wilde was released on November 16, 1966; his detention lasted slightly under 7 months of which 3
months were spent serving the prison sentence. The Commission declared the application admissible on April 7, 1967, after having ordered the joinder of the case with those of Ooms and Versyp.281

The applicant Ooms reported on December 21, 1966, to the deputy superintendent of police at Namur in order to be treated as vagrant unless one of the social services could find him employment with board and lodging while waiting for regular work. He explained that he had lost his job and could not find another one, that he had no means for subsistence and that he had been "convicted" in 1959 for vagrancy by a police court. On the same day the police court at Namur satisfied itself of his vagrancy at a public hearing, after giving Ooms an opportunity to reply, and had him detained according to Section 16 of the 1891 Act in an assistance home. On April 12, 1966, Ooms petitioned the Minister of Justice for his release alleging that he suffered from tuberculosis and that his family had agreed to take him with them and to place him in a sanitarium. On May 5, the Minister after receiving unfavorable opinions from the physician and the director of the institution in which Ooms was detained considered the request premature. In a further petition of June 6, directed to the Prime Minister, Ooms repeated his request, adding that he had been ill since his detention and for this reason was unable to earn the 2,000 BF needed as release savings. The Ministry of Justice to which the petition was transferred declared it again premature on June 14. On the following day Ooms supplemented an original application to the Commission of May 20 in which he made the same statements as in his petitions of April 12 and June 6, adding that it would take him at least a year to earn the release savings of 2,000 BF at the hourly pay of 1.75 BF. In the supplemental application to the Commission he stated that at present he was cured from his disease caused by ill treatment and undernourishment but still could not perform heavy work. He considered himself entitled to release and invoked Article 6(3)(b) and (c) of the Convention, complaining also that he had asked in vain for free legal aid, a fact contested before the Court by the Belgian Government's Agent. On July 1, Ooms sent a declaration by the welfare department of the Salvation Army in Brussels to the director of the welfare settlement at Wortel, which stated that on his release he would be given work and lodging in their establishment but this had

281 12 Vagrancy Case, supra note 273, at 15-17.
no result. Upon receiving a letter from Ooms' mother, confirming her son's declarations in his letter of July 15 to this director, the director asked her on July 22 to produce a certificate of employment for her son, showing that at the time of his release he would have a resting place and a definite job insuring his upkeep. Ooms' mother also asked the Minister of Justice on July 16 for a "pardon" for her son. On August 3, the Ministry informed her that her son would be freed when he had earned through prison work the sum required in the regulations as release savings of vagrants interned for an indefinite period at the disposal of the Government. On August 31, the director of the Wortel settlement reported to the Ministry of Justice that Ooms had received several criminal convictions, that this was his fourth detention for vagrancy, that his conduct was not exemplary, that he had earned only 400 BF and that according to a medical certificate a physical examination had not revealed anything wrong. Thereupon the Ministry let Ooms know that his complaints had been found to be groundless. Once more, on September 26, Ooms petitioned the Prime Minister. He complained about the negative attitude of the Department of Justice and stated that he considered himself a victim of "monstrous injustices" which he attributed to his being a Walloon. He alleged mistreatment that had caused pneumonia and tuberculosis for which he had to spend 3 months in the sanitarium of one of the institutions. He stated that he was ready to take action, if necessary, before a "national authority" in the meaning of Article 13 of the Convention. The letter was transmitted to the Department of Justice. Ooms was released on December 21, 1967, exactly 1 year after being taken into detention.

On February 11, 1967, the Commission declared some parts of Ooms' application inadmissible as manifestly ill-founded, but on April 7, 1967, declared the remaining part admissible after having ordered its joinder with the applications of De Wilde and Versyp.

On November 3, 1965, the applicant Versyp presented to the deputy superintendent of police at Brussels a letter from the Social Rehabilitation Office requesting that he be given a night's shelter. He stated that he had no fixed abode, no work, no resources and asked to be sent to a welfare settlement, admitting that he had been there previously and did not wish any other solution. After spending the night in the municipal jail he was put at the disposal of the

292 Id. at 17-20.
public prosecutor's office. The Social Rehabilitation Office had expressed no objection to this as Versyp was well known to it and attempts to rehabilitate him had failed due to his apathy, idleness and weakness for drink. The police court in Brussels confirmed his vagrancy at a public hearing and after giving Versyp an opportunity to reply, placed him at the disposal of the Government, according to section 13 of the 1891 Act, to be detained in a vagrancy center for 2 years. On February 7, 1966, he petitioned the Minister of Justice to be transferred to the solitary confinement division at another place. The visiting inspector general granted his request on the next day. On May 10, he requested his transfer to a prison near Brussels where the Head of the Social Rehabilitation Service could get him outside work. He complained that living with the other vagrants had shattered his morale and twice caused his hospitalization, and he promised to work better outside. A report by the institution indicated that Versyp had nine criminal convictions and four detentions for vagrancy, that he had spent the greater part of his detention in solitary confinement and could not adapt himself to communal life. His transfer to solitary confinement, at his request, was recommended and carried out.

On August 16, 1966, Versyp lodged an application with the Commission and supplemented it on September 6. He invoked Articles 4, 5 and 6(3)(c) of the Convention. He complained of his detention though he had a fixed abode near Brussels and had never begged. He alleged that he had no chance to defend himself before the Brussels police court on November 4, 1965, as the hearing had lasted scarcely two minutes and he had not been granted free legal aid. He also complained that to prevent him from accumulating the 2,000 BF required as release savings, he had been left for several months without sufficient work; that the directors of the various institutions cooperated in prolonging the detention of vagrants as much as possible as did the Government, a fact which provided it with a labor force almost without cost (1.75 BF hourly wage); that his numerous letters to the competent authorities were returned to the director of the institution concerned who filed them away without further action and that one, directed to the Minister of Justice by registered mail, had been opened by the director and held back.

In a further petition of August 19, 1966 to the Minister of Justice, Versyp asked to be granted a chance for rehabilitation in society through the help of the Brussels Social Service. He was informed that his case would be examined when his release savings proved
that he was capable of doing suitable work. Again, he asked for a transfer to a place where the Social Rehabilitation Service would find him a suitable job and accommodation. He was informed that the letter would be filed without action. On August 1, 1967, the institution gave a favorable opinion upon a request by Versyp to be released soon as this would make it easier for him to find a job than at the regular release time in November. He was released on August 10, 1967, upon a ministerial decision of August 3, based upon section 15 of the 1891 Act. He had been detained 1 year, 9 months and 6 days. The Commission declared the application on April 7, 1967, to be admissible and ordered its joinder with the De Wilder and Ooms applications.

The Court proceeded to answer three questions: (1) whether it had jurisdiction to examine the alleged failure to comply with Article 26 either with regard to the exhaustion of domestic remedies or

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293 Id. at 20-23. Before the Commission the applicants invoked Articles 4, 5(1), 5(3), 5(4), 6(1), 6(3)(b) and (c), 7, 8, and 13 of the Convention. De Wilde and Versyp also invoked Article 3. In its Report of July 19, 1969 the Commission expressed this opinion:

that there was a violation of Article 4 (nine votes to two), 5(4) (nine votes to two) and 8 (ten votes to one); that there was no violation of Articles 3 (unanimous) and 5(1) (ten votes to one); that Articles 5(3) (unanimous), 6(1) (ten votes to one) 6(3) (ten votes to one) and 7 (unanimous) were inapplicable; that it was no longer necessary to consider Article 13 (unanimous).

In a memorandum of the applicants which the Commission appended to its memorial for the Court, De Wilde and Versyp no longer claimed a violation of Article 3 of the Convention. Id. at 23-27.

Regarding the procedural aspects of the cases the Government requested the Court to declare that the applications were not admissible as the applicants had failed to exhaust the domestic remedies and that, therefore, they should have been rejected by the Commission under Articles 26 and 27(3) of the Convention. Id. at 27.

The Commission asked the Court:

in the first place: to hold the Government’s request inadmissible on the ground that the Court has no jurisdiction to pronounce on decisions by the Commission concerning the admissibility of applications;

alternatively: to declare the Government’s request inadmissible on the ground that it is debarred from making it since it did not raise the objection of nonexhaustion of domestic remedies before the Commission when the admissibility of the applications was considered;

in the further alternative: to declare the Government’s request ill-founded since, at the time when the application was lodged with the Commission, there was no effective remedy in Belgian law against magistrates’ decisions in vagrancy cases.

The Government countered by requesting the Court to find that it is competent as to the admissibility of the applications in cases before it and in particular to verify whether the applicants had exhausted the domestic remedies and to find the applications inadmissible since the applicants failed to observe the provisions of Article 26 of the Convention in general and, in the case of Versyp, also with regard to the six month time-limit. Id. at 28.
with regard to the six month time-limit; (2) if so, whether the Government was precluded from raising the question of inadmissibility of the applications; and (3) if the Government is not precluded, whether its contentions as to inadmissibility were ill-founded.

As to point (1) the Court referred to Article 45 of the Convention which reads: "The Jurisdiction of the Court shall extend to all cases" (in the French text "toutes les affaires") "concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48;" it recalled its stand in the Language Case that "the basis of the jurisdiction ratione materiae of the Court is established once the case raises a question of the interpretation or application of the Convention." It emphasized the broadness of the wording of Article 45 ("cases concerning the interpretation and application of the . . . Convention") and remarked that Article 46(1) confirms the very general meaning of Article 45 by using the term "all matters" which is even wider than "all cases" used in Article 45. It concluded from this that once a case is referred to the Court under observation of the prerequisites of Articles 47 and 48, the Court is endowed with full jurisdiction and may take cognizance of all questions of fact and law which may arise in the course of the consideration of the case. Questions of interpretation and application of Article 26 raised before the Court must fall within the jurisdiction especially for the reason that exhaustion of domestic remedies delimits the area within which the contracting States have agreed to answer for wrongs before the organs of the Convention and that the Court has to ensure the observance of these provisions as well as of the individual rights guaranteed by the Convention. The Court emphasized that the rule as to the exhaustion of domestic remedies is one of the generally accepted principles of international law to which Article 26 refers expressly. The 6-month rule, the Court said, results from a special provision in the Convention and constitutes an element of legal stability.

Finally, the Court rejected the idea that its conclusions are invalidated by the power conferred upon the Commission in Article 27 of the Convention as to the admissibility of applications. The Commission's decision to reject an application as inadmissible are without appeal; those which accept a petition, the Court argued, are

294 Text accompanying note 151 supra.
without appeal in the sense that they have the effect of leading the Commission to perform the functions under Articles 28-31 of the Convention which open up the possibility that the case may reach the Court. In this regard the Court referred back to its judgment of November 14, 1960, in the Lawless Case in which it recognized the complete independence of the Commission from the Court. This, however, the Court concluded, does not mean that the Court is bound by the acceptance of an application by the Commission any more than it is bound by an opinion of the Commission as to the merits as expressed in the Commission’s final Report rendered under Article 31 of the Convention. Thus, the judgment answered in the affirmative the question of whether the Court has jurisdiction to examine the Commission’s decision to accept an application as admissible with regard to the prerequisites of Articles 27(3), 26 of the Convention. The Court had already come to this conclusion implicitly in the Matznetter Case.

Judge Zekia, concurring, emphasized that a ruling of the Commission admitting an application does not and ought not to have the effect of finality of a ruling denying admissibility and thus exclude its questioning by any authority whatsoever, including the Committee of Ministers and the Court. Otherwise, he concluded, the Court could be handicapped in the exercise of its jurisdiction and precluded from arriving at conclusions contrary to the way in which the Commission dealt with any of the prerequisites for admission under Articles 26 and 27; this could not have been the intention of the Parties to the Convention, who are, as a rule, especially jealous of the observance of the prerequisite of exhaustion of municipal remedies, recognized in general by international law. He did not think that the ruling on admissibility by the Commission was actually an issue before the Court as its effect, the investigation under Article 31, was fulfilled before the case ever reached the Court.

Judges Ross and Sigurjonsson in their dissent argued that “case” in Article 45 means the facts found by the Commission in its Report; that a “case” does not exist until the Commission’s Report has been transmitted to the Committee of Ministers; that if the “case” has been referred to the Court its jurisdiction consists in interpreting...
and applying the Convention to all the "matters," i.e., to all the facts found by the Commission in its Report and in rendering a final judgment (Article 52) as to whether those facts found by the Commission disclose a breach by the State concerned of its obligations under the Convention. According to them a final judgment can only be one that deals with the merits of the "case," i.e., whether the facts found by the Commission disclose a violation of the Convention. They considered the admissibility or inadmissibility of an application to be a preliminary (procedural) question left to the power of the Commission as contrasted with the question of whether the facts found in the Commission's Report disclose a breach of the Convention which would be a matter for the jurisdiction of the Court or, if the case is not brought before the Court, of the Committee of Ministers. They believed that the question of admissibility or inadmissibility is, as a matter of logic, indivisible. It would be illogical if the Commission had exclusive jurisdiction to reject an application but not if it accepted it so that the Court or, if the Court was not invoked, the Committee of Ministers, could have jurisdiction as to the preliminary (procedural) question of whether the Commission rightly or wrongly interpreted and applied Article 27 of the Convention. They then considered Article 29 of the Convention and believed that the Commission's power to resume at any time its consideration of admissibility proved that it had sole jurisdiction on this point and that, unless there is a unanimous decision to reject a petition formerly accepted, the Court has no jurisdiction to consider the preliminary question, thus freeing the Court from questions which do not relate to the facts found in the Commission's Report.

Judge Bilge in his dissent discussed first the argument of the Court regarding the broad meaning of "cases" in Article 45 of the Convention. He noted that for the word "affairs" in the French text, the English text uses three different expressions, namely "question," "cases," and "matters." Given such divergencies

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299 Article 29 as amended by the Third Protocol to the Convention of May 6, 1963 reads: "After it has accepted a petition submitted under Article 25, the Commission may nevertheless decide unanimously to reject the petition, if, in the course of its examination, it finds that the existence of one of the grounds for nonacceptance provided for in Article 27 has been established. In such a case the decision shall be communicated to the parties." COLLECTED TEXTS, supra note 78, at 36, 9.

300 12 Vagrancy Cases, supra note 273, at 49-51.

301 Text accompanying notes 152-62 supra.

302 Convention, supra note 25, art. 32(1).
one ought to go to the source of the Court’s jurisdiction to harmonize the expressions used. Judge Bilge thought that what is referred by the Commission as an “affair” (as used in the French text of Article 32(1)) to the Committee of Ministers or to the Court is the “question” (as used in the English text) of whether there has or has not been a violation of the Convention. This meaning of “affair” seemed to him to be confirmed by the general plan of the Convention that set up in Article 19 two organs, the Commission and the Court, each with defined powers: competence to decide about the admissibility in the Commission, jurisdiction to decide as to violations in the Court. The Court’s attitude to allow it to supervise the admissibility causes an enormous waste of time if the Court finds that Article 26 has not been observed. The rule of exhaustion of domestic remedies is also not concerned with the internal organization of a given international jurisdictional body. Judge Bilge also shared the argument of the dissent by Judges Ross and Sigurjónsson that the question of admissibility and inadmissibility appears indivisible so that a treatment of one differently from the other would be illogical.305

Judge Wold in his dissent saw in the task of the Commission to consider admissibility of applications (exhaustion of domestic remedies, compatibility with the Convention, and not being manifestly ill-founded) to be one of sifting and screening to prevent a flood of cases, a task to be handled only by the Commission. While under Article 19 both the Commission and the Court have the duty to ensure the observance of the engagements undertaken by the Contracting States, this task, according to Judge Wold, is divided between these two organs. He thought that the question of domestic remedies is not part of the “case,” as this question had already been finally decided by the Commission exercising a judicial function against which no appeal lies and that, therefore, the interpretation and application of Article 26 is outside the jurisdiction of the Court. The Court, though it can decide about its own jurisdiction, cannot do so with regard to the jurisdiction of the Commission. Denial and affirmation of the exhaustion of domestic remedies should be on the same footing, as both should be considered final judicial decisions.

303 Id. art. 45.
304 Id. art. 46.
305 12 Vagrancy Cases, supra note 273, at 52-54.
As the Contracting States must accept negative decisions by the Commission about exhaustion of domestic remedies, why should they be allowed to challenge affirmative ones? If the Court can decide against the admission by the Commission, inequality between the applicant and the State in the proceedings would become more aggravated. According to Judge Wold the proceedings according to Articles 28-31 show that the State shall abide by decisions of admissibility. If after the strenuous work of the Commission either it or the State exercises its right to refer the case to the Court, the Court must deal with it and cannot decide that it will not go into the merits of the case. As the State has ample opportunity to discuss and plead the question of exhaustion of domestic remedies and to work toward a reversal of the admission during the consideration of the Commission, Judge Wold thought it unreasonable to allow the State to pursue the question further and take it up before the Court. The term “case” in Article 45 of the Convention should mean the Report of the Commission on the facts and its opinion as to whether the facts disclose a breach of the Convention. In other words, the Court should try only the merits. Judge Wold believed that it is “generally understood” that the Ministers should not deal with the question of admissibility; then the Court too should have only the same competence, namely to deal with the merits only. If the Court assumes jurisdiction as to admissibility it might well happen that no final decision on the merits is reached although a majority of the Commission thought that a grave violation of the Convention had occurred.\footnote{Id. at 55-58.}

It is satisfying that the Court has rendered a decision in depth about the question of whether it has jurisdiction to reexamine the admissibility of an application under Article 26 either as regards the exhaustion of domestic remedies or as regards the 6-month time limit. The reasoning expressed in the judgment and in the concurring opinion of Judge Zekia is more convincing than that of the dissenters. It should be kept in mind that the Commission is not conceived in the Convention as a judicial organ. It is therefore logical to apply this concept to both its “opinions” and its “decisions” on admissibility which are only preliminaries to its opinions. The denial of an admission means that its mechanism toward forming an opinion as to the merits of the case will not be started, the
contrary "decision" to admit the application will put this mechanism in motion. Though in the first case this amounts practically to finality, in the sense that the case will not reach the Court, it is the Court alone that can make judicial decisions and, because of the broad wording of Article 45 of the Convention, its jurisdiction to do so extends to the whole array of subjects covered by the Convention, including the limitations which the Contracting States have put upon their subjecting themselves to the international adjudication provided for in the Convention. Entrusting the Commission with making the preliminary "decision" of admissibility does not necessarily mean that, if the case reaches the Court, the Court would be precluded from dealing judicially with the issue. The possibility that the Commission, under Article 29, may reconsider its previous admission and, by a unanimous decision, reject it does not prove that it has sole jurisdiction on this point. The argument of Judge Wold that as the Contracting States must accept a negative decision by the Commission, they should not have the right to challenge an affirmative one, overlooks that, at least as to applications brought under Article 25 of the Convention (a vast majority of all cases initiated) no Contracting State is likely to have any interest to fight a negative decision. On the other hand, circumstances may arise only after the opinion of the Commission was rendered that could, in the interest of the applicant, make it mandatory for the Court to decide upon admissibility, as it happened in this case with regard to the Versyp application under the viewpoint of failure to observe the 6-month time limit. Judge Wold's last argument that a reversal by the Court of an admission of an application may happen in a case where the Commission has found grave violations of the Convention, and thus be detrimental to the cause of human rights, is impressive. Yet it too cannot wipe out the limitations which the Contracting States have imposed in the Convention and, under general international law, to international adjudication. Besides, it must be kept in mind that the Commission itself may reject a petition as inadmissible even if at that moment of time it is already convinced that violations of the Convention have occurred.

As to the question whether the Government was estopped from raising the point of inadmissibility, the Court arrived at unanimous decisions. As will be seen, it dealt with the issue under three aspects.

307 Text accompanying notes 313, 318 infra.
The Court ruled that it has to take into consideration the problem of estoppel for procedural reasons; that international and national law as well as Rule 46(1) of the Rules of Court\textsuperscript{308} required that objections to admissibility should as a general rule be raised \textit{in limite litis}; and that though the proceedings before the Commission and the Court are not identical and usually even the parties are not the same, objections to jurisdiction and admissibility must on principle be raised before the Commission to the extent that this is possible. The Court referred back to its attitude in the \textit{Stögmüller}\textsuperscript{309} and \textit{Matznetter}\textsuperscript{310} Cases. It added that states may, under international practice, waive the benefit of the rule of exhaustion of domestic remedies and in case of waiver may not withdraw it at will after the case has been referred to the Court. Reviewing the events in the proceedings before the Commission the Court acknowledged that a Member of the Commission at a certain point asked the Agent of the Government about the possibility of challenging before the Conseil d'État decisions of magistrates in vagrancy matters and decisions of the Minister of Justice refusing to release a detained vagrant. The Agent of the Government thereupon described the attitude of the Conseil d'État that it had no jurisdiction to hear an appeal in the former situation (\textit{Vleminckx} judgment of 1951), that however at least one case was pending before the Conseil d'État concerning this question (\textit{Du Bois case})\textsuperscript{311} and that, in his opinion, the decision of the Minister of Justice could be set aside by the Conseil d'État on a pure point of law. However, the Agent of the Government did not use all this as an argument either to reject the applications for nonexhaustion of domestic remedies or at least to adjourn the decision on admissibility. Two months after the Commission admitted the petitions, upon the conclusion that there were no domestic remedies, the Conseil d'État rendered in June 1967 the \textit{Du Bois} judgment that allowed an appeal from the magistrate's order whereupon the Government requested the Commission to reject the petition as inadmissible for nonexhaustion of domestic remedies. Counsel for the applicants objected that at that stage the

\textsuperscript{308} Rule 46(1) reads: "A preliminary objection must be filed by a Party at the latest before expiry of the time-limit fixed for the delivery of its first pleading." \textit{Collected Texts}, supra note 28, at 419.

\textsuperscript{309} Text accompanying note 226 supra.

\textsuperscript{310} Text accompanying notes 245, 246 supra.

\textsuperscript{311} See note 274 supra.
Government could not dispute the admissibility that had been finally determined by the Commission. The Commission refused the Government’s request in its final Report for the reason that an applicant need not, under international law as referred to in Article 26 of the Convention, exhaust a remedy if, in view of the existing case law of the domestic courts, this remedy had no reasonable chance of success. This was the case before the Du Bois judgment which therefore was not a new factor justifying the reopening of the admissibility issue. The Court concluded that under these circumstances the Government was not precluded from raising before it the objection of nonexhaustion of domestic remedies as regards the magistrates’ orders.\(^{312}\)

Next, the Court took up the Government’s alternative submission that Versyp’s application was out of time. It recalled that Versyp applied to the Commission on August 16, 1966, or more than 6 months after the magistrate’s decision against him and that the Government argued before the Court that if the Court believed that the magistrate’s decision was not at the time subject to any appeal, Versyp’s application to the Commission should be held inadmissible as out of time under the last part of Article 26. The Court found that this submission was never made before the Commission nor in the written pleadings before the Court but, for the first time, in an address of November 16, 1970, i.e., more than 3 years after the Commission’s decision to admit the petition and more than 1 year after the case reached the Court and it concluded therefore that the Government was precluded from submitting that Versyp’s application was out of time.\(^{313}\)

The third aspect of the estoppel issue was the question whether the Government was estopped from submitting before the Court the argument of nonexhaustion of domestic remedies as regards the decisions of the Ministers of Justice rejecting the applicants’ release. The applicants argued that their detention by the Minister violated Article 5(1) of the Convention. The Government replied that they could have contested those decisions before the Conseil d’État alleging a violation of Article 5 which is directly applicable in Belgian law. But the Court concluded that as the Government never relied on Article 26 on this point before the Commission it was

\(^{312}\) 12 Vagrancy Cases, supra note 273, at 30-32.

\(^{313}\) Id. at 32-33.
precluded from doing so before the Court.\footnote{Id. at 33.}

None of the separate opinions of individual judges deals with the estoppel issue on which the Court's judgment was unanimous. Judge Zekia, in his concurring opinion, briefly stated that according to him all domestic remedies had been exhausted as none of the applicants, throughout the material time, could reasonably anticipate the \textit{Du Bois} judgment.\footnote{Id. at 61; see text accompanying notes 317-18 infra.} The effect of this part of the judgment was that only the objection of nonexhaustion of domestic remedies as regards the orders of the three magistrates had to be examined as to its substance.

To this point the Court recalled that under international law, as referred to in Article 26 of the Convention, the requirement demands only the use of such remedies as are available to the persons concerned and are capable of providing redress for their complaints.\footnote{The Court referred back to the Stögmüller Case, text accompanying note 225 supra.} It emphasized that the Government must indicate the remedies which it considers available and which it thought they should have exhausted. The Government never contested that these orders were of an administrative nature and thus not subject to appeal or proceedings in cassation. It also acknowledged at the first hearing before the Commission, apparently on the basis of the \textit{Vleminckx} judgment of 1951, that the Conseil d'État also would not have allowed an appeal against these orders. After the \textit{Du Bois} judgment of June 7, 1967, the Government's Agent admitted before both the Commission and the Court that the old case law was somewhat unrealistic in the sense that, after the magistrates' orders, there was actually no further administrative decision but simply an administrative measure of execution of the magistrates' orders, \textit{i.e.}, a purely physical execution.\footnote{Text accompanying note 308 supra.} Though the Minister of Justice could intervene under the 1891 Act and stop the execution of the detention orders, he generally did not do so. Yet, the Government's Agent argued before the Commission and before the Court, that the applicants were not excused from attempting a remedy before the Conseil d'État for the reason that the \textit{Du Bois} judgment opened a challenge of the magistrates' orders before the Conseil d'État, that the \textit{Du Bois} case was already pending before the Conseil d'État at the time when the magistrates' orders of detention against the applicants
were issued, and that therefore a possibility of a reversal of the Vleminckx rule existed at that time.

The Court, however, found that without going into the question whether a recourse to the Conseil d'État could have satisfied the complaints under the settled case law, recourse to the Conseil d'État was thought to be inadmissible and that the Government itself had argued this position in the Du Bois case; therefore the applicants should not be blamed for following this view in 1965 and 1966 which the Government Agent continued to express early in 1967 at the hearings on admissibility before the Commission. The Court added that at the time of the Du Bois judgment in June 1967 the applicants could no longer benefit from a possible remedy, as the 60-day time limit prescribed in Belgian law for invoking the Conseil d'État had expired long before. In conclusion, the Court rejected the submission of inadmissibility of the complaints concerning the magistrates' detention orders on the ground of nonexhaustion of domestic remedies.\(^{318}\)

The second part of the judgment dealt with the merits of the case. It arrived at a holding against the Belgian government that there had been a breach of Article 5(4) of the Convention in that the applicants had no remedy (against the decision ordering their detention) open to them before a Court arrives at its decision at the close of judicial proceedings.\(^{319}\) This point is based strictly on the interpretation of Belgian State procedures, not of procedures before the Court. Suffice it to say, therefore, that the Court found that where the decision depriving a person of his liberty is taken by an administrative body, Article 5(4) requires it to make available to the person detained a right of recourse to a court, but that there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. The Court examined whether the proceedings before the police courts were genuine judicial proceedings; it arrived at a negative answer to this question and concluded that no judicial remedies were open against the detention. It therefore held against the Government as to this point.

The Court held for the Belgian Government as to all other points, including the denial of any violation of Article 5(4) as to the rejection of the applicants' request for release addressed to the adminis-

\(^{318}\) 12 Vagrancy Cases, supra note 273, at 34-35.

\(^{319}\) Id. at 39-42 and 47; as to point II, id. at 4.
trative authorities and the denial of any violation of Article 5(1); as to
the last point the Court found neither irregularity nor arbitrar-
iness in the placing of the applicants, as vagrants, at the disposal of
the government nor incompatibility of the resulting detention with
Article 5(1)(e) which restricts the right of liberty of—among other
categories—vagrants.320

The Court concluded its judgment by reserving, in accordance
with Article 50 of the Convention, the right of the applicants to
apply for just satisfaction on the issue of the breach of Article 5(4).321

J. Vagrancy Reparation Cases

On the basis of its holding against the Belgian Government the
Court was called, for the first time, to enter into a proceeding based
upon Article 50 of the Convention.322 Out of the narration of the
procedure in the Court’s judgment of March 10, 1972, the following
points are of interest on this issue. The President of the Court after
consultation with its members directed that the examination of this
aspect of the cases should be conducted by the Judges who had
taken part in the judgment of June 18, 1971, which, in this case,
meant the plenary court.323 This procedure appears to be an applica-
tion of Rule 48(2) of the Rules of Court under which the plenary
court having been seized of the case may retain jurisdiction over the
whole case. The novelty in the proceedings under Article 50 of the
convention probably was what raised “a serious question affecting
the interpretation of the Convention” in the sense of Rule 48(1) of
the Rules of Court. It is also noteworthy that the court apparently
considered the Article 50 phase of the proceeding to be within the
same case as the proceedings regarding the violation of the Conven-
tion.324

The present proceedings started with letters directed to the Min-
ister of Justice by Mr. Maguée, the legal counselor of the three
applicants, the first one of June 22, 1971, for Versyp, the second of

320 Id. at 43-44, 37-39, 47; as to point II, id. 5, 2.
321 Id. at 47; as to point II, id. at 13.
322 14 Vagrancy Cases, supra note 273, at 5.
323 Judge Bilge could, however, not exercise his function as he had been appointed a mem-
ber of the Turkish Government. Rule 4 of the Rules of Court, COLLECTED TEXTS, supra note
78, at 404.
324 14 Vagrancy Cases, supra note 273, at 5. This viewpoint was later incorporated into Rule
50(3) of the Rules of Court by amendment of this Rule of November 8, 1972, COLLECTED
TEXTS, supra note 78, at 420, 421, 447.
June 30 for Ooms, the third of August 2 for De Wilde. In them Mr. Maguée asked on the basis of the judgment of the Court of June 18, 1971, for damages of 300 BF per day for "unlawful detention." The Minister answered on July 12 as to the first two letters that the Government could only apply the law as it then stood, awaiting the outcome of a bill on "social misfits" which it had submitted to the Parliament on June 17, 1971, to replace the 1891 Act. According to the Government, it had caused the Parliament to pass an interim act, on August 6, 1971, in order to comply with the Court's judgment, which provided that decisions taken under sections 13 and 16 of the 1891 Act were subject to remedies under the Code of Criminal Procedure, including appeal, and that vagrants or beggars in detention under Section 13 or 16 of the 1891 Act on the day of entry into force of this act should have 1 month to avail themselves of the new remedy. Mr. Maguée, considering the Minister's reply to be a refusal, informed him that he proposed to bring the matter before the "competent authorities" and to notify the Commission. He did in fact write first on July 16 to the Committee of Ministers, alleging that the Minister of Justice's reply was a violation of the Court's judgment, and on July 23 to the Commission, referring to Articles 5(5), 48 and 50 of the Convention and requesting the Commission to bring before the Court the claims of these three clients. On August 12, the Minister acknowledged the receipt of counsel's third letter of August 2 referring to De Wilde, noting that all three letters had, by then, been communicated by Mr. Maguée to the Commission. The principal Delegate of the Commission transmitted on July 27, to the Registrar of the Court the letter of July 23 in which the applicants' counsel had asked the Commission to request the Court to award his clients damages for "unlawful detention."325

The judgment of the Court of March 10, 1972, in this matter was divided into two parts: I. "As to the admissibility of the applicant's claim;" and II. "As to the merits of the applicant's claims."326 Regarding the admissibility of the applicant's claims, the Belgian Government requested the Court to rule that the applications for compensation lodged with the Commission were not admissible since domestic remedies had not been exhausted. The Government argued that Article 26 of the Convention applied not only to the

325 14 Vagrancy Cases, supra note 273, at 4-7.
326 Id. at 7-9.
original petition lodged with the Commission under Article 25 but also to a claim made after the Court had held that the case showed a violation of a right guaranteed by the Convention. The Commission opposed this view. According to the Court, Article 27(3) defines the condition to which the Commission's dealing with the petition lodged with it is subjected and therefore relates to the institution of proceeding under Section III of the Convention. The Court continued that the present cases no longer relate to such proceedings but relate to the final phase of proceedings brought before the Court under Section IV at the conclusion of those brought before the Commission; the claims for compensation are not new petitions since they relate to the reparation to be decided by the Court in respect to the adjudged violation and have nothing to do with the introduction of proceedings before the Commission under Articles 25-27. Their transmission by the Commission to the Court without any accompanying Report is only a technical assistance which the Commission is to lend to the court under Rule 71 of the Rules of Procedure of the Commission. The Court concluded that Article 26 is not applicable in the present matter.

The Government also used as an argument against admissibility the text of Article 50 of the Convention. The applicants, not having exhausted domestic remedies, had not established that the Belgian internal law "allows only partial reparation to be made for the consequences" of the violation found by the Court's judgment and therefore their claims for damages were inadmissible. The Court considered the text quoted to be a rule going to the merits but not one of procedural admissibility of claims for "just satisfaction," subordinate to prior exercise of domestic remedies for a lack of provisions of the type of Articles 26 and 27(3) in connection with Article 50. It compared Article 50 with similar clauses in other treaties that show no connection with the rule of exhaustion of domestic remedies. It finally emphasized that if the victim after unsuccessfully exhausting domestic remedies before appealing to the Commission had to do so again before obtaining just satisfaction from the Court, the total length of the proceedings would lead to a situation incompatible with the aim and object of the Convention. The Court therefore declared that the claims for damages were admissible.

327 Collected Texts, supra note 78, at 318.
328 14 Vagrancy Cases, supra, note 273, at 8, 9, 11.
The "(a)s to the merits" part of the judgment deserves some consideration here because, actually, it is partially concerned with procedural aspects. The Government requested the Court to rule that the conditions required for the application of Article 50 of the Convention had not been fulfilled in the present cases and that it is not necessary to afford satisfaction to the applicants. The Commission asked the Court to grant the applicants appropriate satisfaction, bearing in mind that a new remedy had been introduced into Belgian law following the Court's judgment and thus indirectly heeding the applications lodged with the Commission. The Government argued that Belgian domestic law enabled the national courts to order the State to make reparation for damage caused by a situation illegal under internal or international law for which it is responsible, so that the applicants must approach the national courts and as they had not done so, their claims were not only inadmissible but also without foundation.

The Court thought differently. It admitted that treaties, which the text of Article 50 follows, had in mind those cases where the nature of the injury would make it possible to wipe out entirely the consequences of a violation but where the internal law of the State involved precluded this from being done. The Court thought that, nevertheless, in recognizing the Court's competence to grant the injured party a just satisfaction, Article 50 covers also the case where the very nature of the injury makes impossible a *restitutio in integrum* and that common sense suggests that this must be so *a fortiori*. It saw no reason why, in the latter case just as in the former, it should not have the right to award the injured persons the just satisfaction that they had not obtained from the Government of the respondent State. This, the Court decided, was the situation in the present cases; for no legal system, including that of Belgium, can wipe out the consequences of the fact that the applicants did not have available the right guaranteed by Article 5(4) to take proceedings before a court in order to have the lawfulness of their detention decided. Furthermore, the Belgian government had denied the compensation which they claimed. The Court concluded that the mere facts that the applicants could have brought and could still bring their claims before a Belgian court does not require the Court to dismiss the claims as ill-founded any more than to declare them inadmissible.

The Court examined more closely the situation where the consequences of a violation are only capable of being partially wiped out.
It stated that the affording of “just satisfaction” under Article 50 requires: (1) that the Court find “a decision or measure taken” by an authority of a Contracting State to be “in conflict with the obligations arising from the . . . Convention;” (2) that there is an “injured party;” and (3) that the Court considered it “necessary” to afford just satisfaction. Upon the Government’s pleading that none of these conditions had been fulfilled in the present cases, the Court decided that the first two prerequisites were fulfilled, as no distinction could be made between acts and omissions of a Contracting State and “injured parties” in Article 50 should be equated with “victim” as used in Article 25. Regarding the third prerequisite the Court said that the Government correctly questioned the existence of damage. For the claim of 300 BF per day of detention to be successful it would be necessary to show that the deprivation of liberty had been caused by the violation of Article 5(4). This was not the case here as the Court did not find either irregularity or arbitrariness in the detention that could have resulted in a violation of Article 5(1)(e). The Court therefore did not see how the taking of proceedings to test merely the point of lawfulness dealt with in Article 5(4) could have enabled the applicants to obtain release any sooner. The Court also denied the presence of any moral damage that could have resulted from the violation of Article 5(4). Furthermore, it was noted that the applicants had the benefit of free legal aid before the Commission and later with the Commission’s delegates, and had never made any point concerning costs. The Court therefore found that it had to refuse to grant the compensation claim and noted that Belgium had taken legislative measures to correct the violation of Article 5(4) of the Convention. Thus, the Court in its judgment of March 10, 1972, declared as to the merits that the applicants’ claims for damages were not well founded.329

Judge Zekia disagreed with the concluding declaration of the judgment disentitling the applicants to damages altogether. He agreed that once the Court had decided that there was no violation of Article 5(1)(e), any claim for damages relating to the detention and its duration was unjustified and therefore the claims calculated on the basis of detention—per diem or otherwise—were rightly rejected. However, that still left the inconvenience caused to the applicants in their attempt to vindicate their right under a judicial

329 Id. at 9-11.
decision in violation of Article 5(4). Their endeavors in this regard extended from their applications to the Commission filed in 1966 up to the judgment of the Court of June 1971. They had to incur all expenses and inconvenience connected with their pursuit before the Commission and the Court. Instead of knowing from a domestic judicial authority within a short time from the order of detention whether they were rightly or wrongly detained under the magistrates’ decisions, they had to go through a cumbersome and very long procedure before two international bodies. According to Judge Zekia they would be entitled to be reimbursed for the expenses connected with this. Even if the Court did not know whether they incurred such expenses, and if so, to what extent, this could be easily ascertained through the Registry of the Court. Surely the Court could be competent to award costs if it thought that the circumstances of the case warranted such costs.\(^{330}\)

Judges Holmbeck, Ross and Wold concurred in their joint separate opinion but disagreed as to the interpretation of Article 50. They recalled the fact that Article 50 was modeled on clauses in various arbitration treaties which were meant to deal with the situation in which a State, though willing to fulfill its international obligations, is unable to do so without changing its Constitution, and therefore conferred on the arbitral tribunal the power to transform this obligation into an obligation to pay the injured party an equitable satisfaction of another type. These Judges, assuming that Article 50 served the same purpose and should be interpreted accordingly, concluded that on this basis the Article does not apply to the present cases according to its wording, but rather only applies under the condition that the internal law of the Party that had violated the Convention “allows only partial reparation to be made.” As to this point these Judges thought that the applicants have afforded no proof that Belgian law does not allow full reparation to be made, contrary to the statements of the Belgian Agent. They recalled the reasoning of the judgment that though the wording of Article 50 covers only the situation where full reparation is made impossible through the internal law, common sense suggests that the Article a fortiori must apply also where the impossibility of the restitutio in integrum results from the very nature of the injury. They disagreed with this argument for the reason that it presupposes an absolute

\(^{330}\) 14 Vagrancy Cases, supra note 273, at 21, 22.
obligation of the State to restore to the applicants the liberty of which they have been deprived, which cannot be done because of the maxim *impossibilium nulla est obligatio*. They admitted that the Court would award just satisfaction in both cases, the one where the nature of the injury would make it possible to wipe out the consequences of a violation and the other where the nature of the violation makes *restitutio in integrum* impossible. But, according to them, the competence of the Court depends in both cases on the fact that internal law does not allow full reparation. As the consequences of a violation can never be wiped out entirely, they considered this criterion as alien to Article 50 and objected to the Court in fact assuming jurisdiction in respect to claims for reparation in all cases where full *restitutio* is impossible regardless of the status of the internal law. Their viewpoint, the Judges said, was in harmony with Articles 5(5) and 13, both of which direct the injured party to seek redress in the courts of the State. It would be incongruous if Article 50 instituted a concurrent means of redress by direct application to the Court. The Judges concluded that the general idea of the Convention, as results also from Articles 53 and 54, is that the Contracting Parties are expected to fulfill their obligations, and therefore, that an injured party must seek redress before the national courts. The one exception would be where a national law prevents the State from making full reparation. In that case Article 50 confers upon the Court the power to afford just satisfaction. For these reasons they held that Article 50 did not apply in the present cases, from which it resulted that the Court lacks jurisdiction to deal with the applicants' claims.\(^3\)

Judge Verdross in his separate concurring opinion added some general remarks about the interpretation of Article 50. From its text he concluded that the Court, before making a decision on just satisfaction, must inquire whether the injured person can obtain adequate satisfaction under the internal law of the State concerned. If this question is answered in the affirmative, then according to the spirit and general system of the Convention, the Court must allow the State to grant adequate compensation under its own procedure while retaining its jurisdiction to see that the satisfaction is provided in an adequate manner and within a reasonable time to be fixed by the Court. For the Court to give the State a chance to afford

\(^3\) *Id.* at 13-15.
just satisfaction through its own courts first is especially important at the initial stage of the application of Article 50, as its interpretation by the Court will determine the legislative measures which the States will have to take to comply with the Court's interpretation.\textsuperscript{332}

Judge Mosler in his separate concurring opinion wished to explain his own interpretation of Article 50. He first remarked that the Court rightly rejected the Government's claim that the applicant should first apply to the internal courts. He said that the Court did not state whether it concluded this merely from the twofold fact that in the present cases \textit{restitutio in integrum} was impossible and that no pecuniary loss or moral damage could be found or whether it considered generally that Article 50 in referring to the internal law covers only the cases in which \textit{restitutio in integrum} is possible and those where it is excluded by the very nature of the violation. This, he said, leaves it uncertain whether the Court should consider internal law in situations where neither of these two last hypotheses applies. The Judge explained his interpretation of Article 50 as follows:

(1) Article 50 is the basis of the Court's jurisdiction in all cases—including those under Article 5(4), where just satisfaction is claimed by an applicant whose case has led to a decision by the Court finding that the State in question has violated the Convention.

(2) In all of these last described cases the Court must inquire whether the internal law allows reparation for the consequences of the violating decisions or measure.

(3) By implication from Article 50 it follows that the duty under Article 53 to abide by the decision of the Court includes a duty to make reparation for all the consequences of the violation. Beyond putting an end to the violation the duty extends to making good the damage suffered by the applicants. Though this duty derives from international law it was necessary to confer expressly upon the court jurisdiction to grant satisfaction since, the applicant not being a party before the Court, the object of these proceedings is not the damage suffered by him but the violation of the convention alleged against the respondent State. Therefore, the effects of the judgment relate only to the finding of a violation, not to the consequences which the violation has caused to the person concerned. This made it necessary to confer upon the Court addi-

\textsuperscript{332} Id. at 16.
tional jurisdiction to afford, in special circumstances, just satisfac-
tion.

(4) In applying Article 50 the Court must first determine ex-
actly what the consequences of the violation are as from the answer
to this question will depend the measures to be taken to assure as
complete a reparation as possible.

(5) These measures will vary according to the nature of the
damages:

(a) If *restitutio in integrum* is possible the state has to
bring it about. For example, unlawfully expropriated prop-
erty must be restored. The Court has neither jurisdiction
nor practical means to do this. Yet if internal law allows
only a partial *restitutio* the Court must assess the effect-
iveness of the internal law and afford just satisfaction for
what is not covered by the State reparation.

(b) If any *restitutio in integrum* is impossible because of
the nature of the injury that excludes a retroactive removal
of its effect there still may be other consequences of a
nature that makes reparation possible, like loss of an em-
ployment opportunity or lawyers' fees or a case where eq-
uity calls for compensation for moral damage. Thus, if in
vagrants cases the primary consequences cannot be made
good either by internal law or by the Court, the national
legislature or administration can still provide for repara-
tion for secondary consequences. As to them the Court has
jurisdiction no matter whether the internal law allows or
does not allow or only partially allows reparation. What-
ever is the interpretation of arbitration treaties that have
served as a model for Article 50 the special wording of this
Article and the special nature of the Convention which is
designed to protect the individual [the judge referred here
*mutatis mutandis* to the language interpretations in the
*Wemhoff* judgment] extends the Court's jurisdictions to
every kind of damage, not only to cases invoking *restitutio
in integrum* or to those involving compensation for an ir-
reversible act causing damage.

(c) The result is the same if the injury can only be made
good by pecuniary compensation, for example where an
unlawfully requisitioned object is destroyed or lost.

(6) Under Article 50 the Court in considering what satisfac-
tion is just shall take into account the existing internal remedies, i.e.,
whether internal law allows total, partial or no reparation, and if necessary the Court can afford such satisfaction as it considers fair. If national law were not to be considered with regard to all the other consequences of the injury the substantive right to damages and the implementation of this right would not affect the Court’s deliberations. The State would lose the option to comply by its own means with the Court’s judgment and be discouraged from adopting into the internal law provisions ensuring such satisfaction.

(7) This does not imply that the Court should require an applicant to exhaust domestic remedies. Rightly the judgment excluded such a new procedural hurdle resembling that in Article 26. Still the Court cannot decide until the applicant has attempted to obtain using the means available under internal law to obtain satisfaction from the national authorities. The Court has jurisdiction to assure itself that this can be done within a reasonable time and with fair results. If difficulties are encountered the Court can, considering the long proceedings before the Commission and then before the Court, grant suitable compensation without having to wait for the completion of national proceedings. It may lay down time limits after the expiration of which it will decide on the satisfaction.

(8) In the present cases the placing in detention was lawful (Article 5(1)(e)). The primary injury was not the detention as such but the absence of any right to take proceedings before a “court” as defined in the judgment. The new Belgian Act establishing a remedy could not put this matter right retroactively. The violation rather is of a nature as to make *restitutio in integrum* impossible. Though conceivably secondary consequences to be made good might exist, the Court inquired about this but found none.334

As this is the first case in which the interpretation of Article 50 was before the Court every phase of the judgment is an important precedent.335 It should be observed that in both parts of its judgment—admissibility and merits—the Court strictly followed the

334 14 Vagrancy Cases, supra note 273, at 17-20.

335 In the judgment to the merits in the Language Case of July 23, 1968, discussed briefly in text accompanying notes 163-65 supra, and in the Stögmüller judgment of November 10, 1969, text accompanying note 227 supra, the Court reserved for the applicants the right to apply for just satisfaction should the occasion arrive. But apparently no reparation proceedings have been initiated before the Court in these two cases. In the Neumeister Case (text accompanying note 202 supra), the Court found a violation but did not expressly reserve the right to apply for just satisfaction. A reparation judgment in that case was rendered only on May 7, 1974, long after those in the Vagrancy and Ringeisen Cases (text accompanying note 211 supra and 421 infra).
The principle that only the States Parties to the Convention and the Commission can be Parties before the Court in spite of the wording of the Judgment of June 18, 1971, that the Court "[r]eserves for the applicant the right should the occasion arise, to apply for just satisfaction" on the issue of a breach of Article 5(4) of the Convention. The "just satisfaction" proceedings were established by a request of counsel of the applicants directed to the Commission to bring the claims before the Court and the Court, implicitly, approved of this way of handling the matter. The unanimous decision as to admissibility of the claim based upon the rejection of the idea that Articles 26 and 27(3) should be applicable in the proceedings before the Court appears convincing. Rightly the Court considered the words "and if internal law of said Party allows only partial reparation. . ." to be a rule going to the merits and in interpreting the spirit of the Convention abhorred the idea of duplicating the necessity of exhausting domestic remedies.

K. Ringeisen Case

The Ringeisen Case originated in an application by Michael Ringeisen, an Austrian citizen, lodged with the Commission on July 3, 1965. In it he complained about violations by the Republic of Austria of Articles 5, 6, 7, 10, 11 and 14 of the Convention and of Articles 1, 2 and 3 of the First Protocol with reference to criminal procedures brought against him and to administrative and civil cases which he had brought before the Austrian authorities. The Commission, in a lengthy decision of July 18, 1968, while rejecting the rest of the claims, declared admissible the allegations in respect to Articles 5(3) and 6(1), of the Convention, regarding the length of applicant's detention on remand and the length of the criminal proceedings against him, and allegations as to Article 6(1) regarding

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326 Text accompanying note 321 supra.
327 Text accompanying note 325 supra.
328 Text accompanying note 328 supra.
341 Id. at 34.
noncriminal proceedings. After failure to reach a friendly settlement the Commission adopted its Report according to Article 31 of the Convention, which was transmitted to the Committee of Ministers on April 29, 1970.\textsuperscript{342} The case was referred by the Commission to the Court on July 24, 1970.

During the years 1958 to 1963 Ringeisen was an insurance agent in Linz, Austria; he also negotiated loans and dealt in real estate. In May and November 1961, Ringeisen obtained general powers of attorney from a Mr. and Mrs. Roth in consideration of a loan made by Ringeisen to them that enabled him to act in their name in dividing, selling, leasing and encumbering land owned by them in upper Austria. Ringeisen also was given an option to purchase the land. On February 6, 1962, Ringeisen made a contract with the Roths to purchase the land for 400,000 Austrian Schillings (AS). On March 30, 1962, the contract was submitted to the local District Real Property Transactions Commission for approval. The Upper Austrian Real Property Transactions Act subjects to approval by the District Commission every transfer of ownership in respect to land wholly or partly used for agriculture or forestry. For such an approval, the Act establishes requirements which encourage the maintenance of the above mentioned uses of the land. Also, among other cases where the requirements are not fulfilled, the Act lists those where there is a reason to fear that the purpose of the purchaser is to resell the land as a whole or in lots for profit. Refusal of the approval renders the transaction null and void. The District Commission refused on September 28, 1962, to approve the Roth-Ringeisen sale contract citing circumstances that clearly revealed the picture of land speculation. Yet even from January 1962 and up to April 1963 Ringeisen sold parts of the land in building sites; he obtained an expert opinion from the Provincial Planning Office, on the basis of which he had the land surveyed and marked out, and he obtained the permission by the local District Administration to build on the property. Yet the actions of these two bodies were expressly given subject to the decision of the District Commission. At first, the contracts between Ringeisen and his buyers stated that the District Commission's approval was necessary to implement them, but Ringeisen informed his purchasers that this was a mere formality and that under the building permits they could start

building at once.

Ringeisen appealed from the District Commission’s refusal to approve the Roth-Ringeisen contract to the Regional Real Property Transaction Commission. The law regarding the Regional Commission assures the independence of its members from interference by the administration and provides that the Commission shall consist of eight members, including a judge appointed by the Provincial Government as president, and seven other persons to be appointed by various governmental agencies. Among these members are two representing the interests of “townspeople and residents in housing estates” and another two apparently representing the rural interests as they are appointed by the Chamber of Agriculture for Upper Austria, and so forth. On May 13, 1963, the Regional Commission dismissed Ringeisen’s appeal, fearing that he would withdraw land from agricultural use on a large scale without adequate reason and that he intended to make a speculative investment.

From this decision Ringeisen made an appeal on July 5, 1963, to the Constitutional Court. He alleged among other things that at the meeting on May 13, 1963, two members took part and voted who had not been present at one or both of the previous meetings at which the Regional Commission had examined the appeal. On June 20, 1964, the Constitutional Court decided that under its own precedents dealing with the questions of proper legal composition of a Board, there was a violation of the right to have proceedings held before a judge established by law. It accordingly set aside the decision of the Regional Commission.

Thus the Regional Commission had to decide again on Ringeisen’s appeal from the District Commission’s decision of September 28, 1962. At the opening of the proceedings Ringeisen challenged five members of the Regional Commission on the grounds of bias for various reasons. Ringeisen based his challenge on a section of the General Administrative Procedure Act under which administrative officials shall refrain from performing their duties in cases in which they have been or are agents of a party, or when other serious grounds give rise to doubt as to their complete impartiality. The Regional Commission decided on February 3, 1965, that though Ringeisen was not entitled to a right of challenge under this act, it would nevertheless examine his allegations *ex officio*; his allegations proved, however to be unfounded. It also rejected his appeal on the merits finding from a variety of circumstances that Ringeisen’s
On April 2, 1965, Ringeisen appealed this decision to the Constitutional Court. Among other grounds he reiterated the bias charges. The Constitutional Court rejected the appeal on September 27, 1965. The Court did not find it necessary to deal with the bias challenges for the reason that even if those allegations were correct and were refused by the Court, Ringeisen was not affected in his right to be judged by the judge established by law. The Court stated that a board does not cease to be competent because a biased member takes part in the proceedings, nor does the participation of a biased member affect the proper composition of a board.344

The Commission with which Ringeisen had lodged his application on July 3, 1965, expressed in its Report under Article 31 of the Convention, its opinion that Article 6(1) had not been violated in the proceedings for approval of the contracts of sale because these proceedings did not involve the determination of "civil rights or obligations." The Court formulated its task as to this point as follows: "Was Ringeisen the victim of a violation of Article 6, paragraph (1) of the Convention in the proceedings he introduced before the competent authorities for approval of a transfer of real property consisting of farmland?"345

The Court in its judgment of July 16, 1971, took the following position.346 On the one hand it held that it certainly would be con-

341 Id. at 6-12.
342 Id. at 35.
343 The Government raised a plea of inadmissibility of the petition on the ground of Article 26 of the Convention, but the Commission opposed the plea since only the Commission, not the Court, had jurisdiction to decide about admissibility. Both the Government and the majority of the Commission contended that Article 6(1) was inapplicable for the reason given by the Commission in its Report, as mentioned above. The Court proceeded to judge this part of the case under the following four aspects: (a) whether it has jurisdiction to deal with the admissibility; (b) if so, whether the complaint was admissible under Article 26; (c) if the answer to (b) is affirmative, whether Article 6(1) is applicable to the proceedings in question; and (d) if the answer to (c) is affirmative, whether the complaint is well-founded.

The Court disposed swiftly of point (a) by reference to the judgment of the plenary court of June 18, 1971, in the Vagrancy Cases and answered the question unanimously in the affirmative. See text accompanying notes 294-97 supra.

As to point (b) the Government's Representatives observed that Ringeisen's application with the Commission was lodged on July 3, 1965, i.e., after Ringeisen had made his second appeal to the Constitutional Court on April 2, 1965, while the Constitutional Court rendered judgment only on September 27, 1965. From this the Government concluded that at the time of lodging the application all domestic remedies had not been exhausted and, consequently,
trary to the spirit of Article 26 to allow a person to lodge an application with the Commission before attempting any domestic remedies. On the other hand, it stated that international courts have held that international law regarding matters of form cannot be applied in the same way as is sometimes necessary in the application of national law. Emphasizing that Article 26 refers expressly to the generally recognized rules of international law, it agreed with occasional findings of the Commission that there was a need for a certain flexibility in the application of that Article. It cited as an example the Commission’s admission of the application by Lawless in his complaint against Ireland. It also observed that the original
applications are often followed up by additional documents to clear up points which are indicated to the applicant by the Commission's Secretary during his preliminary examination of the application. Such supplements might contain proof that the applicant has complied with the conditions of Article 26, even if this was done after lodging the application. Thus, while upholding the duty of the applicant to use the domestic remedies before applying to the Commission, the Court thought that it must be left open to the Commission to accept that the last stage of such remedies may be reached shortly after judging the application but before the Commission pronounces itself as to the admissibility. As a great majority of applications come from laymen without legal assistance the Court rejected a formalistic attitude. The Court denied that any legitimate interest of the respondent State could have been prejudiced by the fact that the application was lodged and registered shortly before the final decision of the Constitutional Court. It rejected as unfounded the submission of inadmissibility under Article 26.

The question of whether Article 6(1) of the Convention was involved was answered by the Court unanimously in the affirmative. It found that, although the Regional Commission applied administrative law, its decision was to be decisive for the relations in civil law between Ringeisen and the Roth couple.

The substantive aspect of whether or not the complaint under Article 6(1) was well founded refers mainly to procedural questions of Austrian law. Suffice it to say in this regard that the Court found not bound to treat questions of form with the same degree of strictness as might be the case in municipal law; it therefore regarded the letter of December 16 as in substance a resubmission of the application as amended and it rejected the Government's objection. For its more liberal attitude it cited the Mavromatis Palestine Concessions Case, [1924] P.C.I.J., ser. A, No. 2, at 34. The Permanent Court of International Justice had to interpret Article 26 of the Palestine Mandate which provided that disputes between the Mandatory and another Member of the League of Nations relating to the interpretation of the Mandate should be submitted to the Permanent Court of International Justice. That Court saw in the dispute one between two States within the meaning of Article 26 of the Mandate as Greece had taken up the claim of her citizen Mavromatis in order to protect him. In this way Greece had in reality asserted its own rights. As to the treatment of the Lawless Case see notes 88-108 supra.


339 Id. at 39, 46.
that the Regional Commission was an independent tribunal in the meaning of Article 6(1) and, upon an examination of the claim of bias against five members of the Regional Commission, that it was an impartial tribunal. In one point, procedural aspects concerning the Court itself were involved, namely regarding the question of whether the Court should have verified, even *proviso motu* whether the District and Regional Commission had heard the case and pronounced the judgement in public as required in Article 6(1). The Court refused this examination because Austria's ratification of the Convention had made a reservation that Article 6 should be applied without prejudice to an Austrian constitutional provision which reads "[h]earings in civil and criminal cases by the trial court shall be oral and in public. Exceptions may be prescribed by law." The Court admitted that this reservation does not refer expressly to administrative proceedings but thought that the reservation covers *a fortiori* proceedings before administrative authorities where the subject matter is the determination of civil rights and where, consequently, such authorities are considered to be a tribunal in the sense of Article 6(1). In conclusion the Court denied unanimously any violation of that Article.\(^{350}\)

As the second aspect of the case (criminal proceedings against Ringeisen) has little connection with the first part (noncriminal proceedings), it appears adequate to deal here with the separate opinions as far as they are concerned with the first part. Of the four separate opinions only two have reference to it. Judges Wold and Sigurjonsson briefly referred to their dissent in the *Vagrancy Cases* as to the Court's jurisdiction in the field of admissibility but felt obliged to submit to the majority of the Court.\(^{351}\) Judge Verdross (the Austrian Judge sitting *ex officio* under Article 43 of the Convention) dissented in his separate opinion from the judgment of the Court as to point (b) regarding the lodging of the application before the Austrian Constitutional Court had reached its decision.\(^{352}\) He made the following points: (1) in the case of two equally authentic texts ("saisie" and "deal with") it is not permissible to select a text that seems to be most practical, but the interpretation must, in the sense of Article 33(4) of the Vienna Convention on the Law of Treat-

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\(^{350}\) *Id.* at 39-41, 46.

\(^{351}\) *Id.* at 48.

\(^{352}\) Text accompanying notes 347-48 *supra.*
ies, reconcile the texts, having regard to the object and purpose of the treaty; (2) to "deal with"—the wider version—covers every act of an authority in a case brought before it, even the registration of a case by the Commission, and from this it results that only the French version can be reconciled with the two texts; (3) as "deal with" in Article 26 refers to both the exhaustion of domestic remedies and the 6-month time limit, the wider meaning of "concern itself with an application" would lead to the absurd result that the Commission could concern itself with an application only within 6 months from the date of the final domestic decision; (4) also, Article 27(3) speaks for the strict interpretation as it indicates that the Commission must decide about the admissibility ex tunc, i.e., whether the application as such fulfilled the conditions of Article 26, and not ex nunc, i.e., at the time when it begins the examination of the case. The analysis of general international law by the Commission and the Chamber of the Court is irrelevant because the reference to it in Article 26 is made within the special rules of that Article, which must prevail over general international law that is not jus cogens in regard to exhaustion of domestic remedies; (5) this interpretation of Article 26 fulfills its purpose as all its provisions which delimit international jurisdiction aim at protecting the States from being arraigned on the international level before they are able to correct a violation possibly committed by an organ of lower rank—therefore, every provision in this category must be applied strictly; and (6) though it may perhaps be appropriate to amend Article 26 in favor of the interpretation by the Chamber, the Commission and the Court must apply the Convention as drafted and cannot revise it.

It appears unlikely that a discrepancy between "saisie" and "deal with" can be solved through linguistic acrobatics. Both the Court and the dissenter want to protect the States' legitimate interest which the dissenter defines extensively in the way described above in point (5). Even under this wide interpretation the State seems not to be prejudiced if, upon an application lodged after putting in motion the last domestic remedy allowed, no substantive step is taken by the Commission before the definitive domestic decision is rendered. The following reflections seem to reinforce the conclusion that in such circumstances the application should not be rejected under Articles 26 and 27(3). Suppose that in a criminal case a person had been sentenced to a long term of imprisonment and is held in detention on remand because he had absconded for a long time.
and is likely to become a fugitive again. He has appealed from the judgment to the highest court of the land, claiming his innocence. The total time of his detention on remand approaches the length of the prison term imposed by the judgment. The highest court of the state is overloaded with appeals and, according to past experience, it will take months before this court will handle the appeal. Should an application based upon Article 5(3) and (4), and lodged after making the appeal to the highest domestic court but before the domestic decision is rendered be rejected under Articles 26, 27(3)? It is submitted that such a rejection would be contrary to the main purpose of the Convention, the protection of human rights.

An analogous situation appears in the Greek Case which was dealt with by the Commission and the Committee of Ministers of the Council of Europe. There, the Commission stated in its Report:

Where . . . there is a practice of nonobservance of certain Convention provisions, the remedies prescribed will of necessity be side-stepped or rendered inadequate. Thus, if there was an administrative practice of torture or ill-treatment, judicial remedies prescribed would tend to be rendered ineffective by the difficulty of securing probative evidence, and administrative inquiries would either not be instituted or, if they were, would be likely to be half-hearted and incomplete.

The Commission then noted that evidence of an administrative practice of torture in violation of Article 3 of the convention had, at the admissions stage, not yet been produced. Yet it held the allegations of the applying Government admissible; it could not find, regarding the measures taken by the Greek Government with respect to the status and functioning of the courts of law, that the domestic remedies indicated by that Government were effective and sufficient. From this it concluded that the allegations under Article 3 could not be rejected for nonexhaustion of domestic remedies under Article 26. The Committee of Ministers decided that there was, among others, a violation of Article 3.

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354 Id. at 194.

The application lodged with the Commission also should be considered as self-perpetuating up to the moment of its being disposed of by the decision of the Commission regarding its admissibility. Then, even if defective under Article 26 at the time of lodging, the application would be cured as of the time when the last domestic remedy is exhausted by a decision rendered upon the domestic appeal and before the decision by the Commission. This may be the underlying thought of both the majority decision when it referred to additional documents submitted to support the original application, and the Commission’s decision about admissibility of the Lawless application. This point, too, speaks for the correctness of the majority decision.

Two criminal proceedings were brought against Ringeisen. The subject of one was acts of fraud and fraudulent conversion while the other was concerned with fraudulent bankruptcy. Both grew out of the land transactions described in which Ringeisen did not deliver valid title to the lands he sold. They ran separately but at the same time.

The fraud case started in February 1963. Ringeisen was held in detention on remand in the fraud case from August 5 to December 23, 1963, on the ground of danger of further offenses and of danger of suppression of evidence. His release was granted by the Court of Appeal, subject to giving a solemn undertaking, for the reasons that the original grounds for detention had ceased to exist. The indictment in the fraud case was filed in April 1965. Ringeisen was accused (I) of having falsely pretended to be an honest real estate seller and agent with the view to induce (A) 78 persons to make payments of some 1,400,000 AS, and (B) two other persons, (1) Widman and (2) Schamberger, to grant loans which were largely not repaid; (II) of having misused the power of attorney given and later revoked by the Roth couple, by encumbering their land. On Janu-

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Footnotes:
356 Text accompanying note 348 supra.
357 Text accompanying note 348 supra. Because of this curing effect it should not make any difference that Ringeisen notified the Commission of the final decision of the domestic court more than 6 months after it was taken (supra note 348), while Lawless’ representative informed the Commission of Lawless’ release within a few days after that event. Lawless Case, [1961] 3 Eur. Ct. Human Rights 42.
358 Id. at 22-24.
359 Id. at 15.
ary 14, 1966 he was found guilty on counts IA and IB(1) (Widman) and acquitted as to the other charges. He was sentenced to 3 years severe imprisonment. The Court reckoned as part of the sentence the time spent in custody on remand from August 5 to December 23, 1963, and from March 15, 1965, to January 14, 1966, the latter period to be explained shortly. Upon Ringeisen's and the prosecutor's pleas of nullity and appeal, the Supreme Court on July 27, 1966, set aside the decision and referred the case back to the Regional Court for rehearing with regard to the conviction under IB(1) (Widman), the acquittal under II (Roth couple) and the sentence; the convictions under IA (78 purchasers) and the acquittal as to IB(2) (Schamberger) were upheld. The Regional Court discontinued, on the prosecutor's application, the cases under IB(1) (Widman) and II (Roth couple) and rendered sentence as to IA (78 purchasers) on October 18, 1966. Since the Court could pronounce a heavier sentence on the basis of the prosecutor's appeal against the first judgment, the Court increased the severe imprisonment from 3 to 5 years; it reckoned as part of the sentence also the time spent in detention on remand from the first to the new judgment of October 18, 1966. Considering a new plea of nullity by Ringeisen, the Supreme Court dismissed the plea on February 15, 1968, but reduced the sentence to 2 years and 9 months severe imprisonment. On April 24, 1968, the Regional Court supplemented the sentence by reckoning the entire time spent in detention on remand as part of it. As will be seen, the detention had ended on March 20, 1967.

The fraudulent bankruptcy case started in August 1964. While it was progressing a receiver was appointed in March 1965 over Ringeisen's property in Linz, and on May 14, 1965, Ringeisen was adjudged bankrupt. Notice thereof was given, according to law, to an extensive list of public authorities and was published in the local official gazette. In March 1966 an indictment was filed. Ringeisen was accused of having intentionally defeated or curtailed the satisfaction of his creditors by concealing assets or alleging a nonexisting liability. In September 1968 the prosecution announced the withdrawal of the charges of fraudulent bankruptcy, in view of Ringeisen's final conviction and the sentence imposed in the fraud case.

347 Id. at 17.
348 Id. at 18, 19.
354 Id. at 19, 20, 33, 34.
349 Id. at 20, 21.
on February 15, 1968. The Linz Regional Court thereupon ordered the discontinuance of the prosecution for fraudulent bankruptcy.\textsuperscript{366}

Ringeisen was held in detention on remand for two periods. The first one, in the fraud case, lasted from August 5 to December 23, 1963, as was mentioned above.\textsuperscript{367} On March 15, 1965, the prosecution asked the investigating judge in the fraudulent bankruptcy case for an order of arrest and detention on remand on the basis of danger of collusion and committing further offenses. The order was granted and Ringeisen was arrested on the same day. It is noteworthy that throughout both criminal proceedings Ringeisen made innumerable requests and appeals not only for his release but also for the transfer of the proceedings because of the alleged prejudice of local and regional judges and other officials involved; he also challenged directly or indirectly, through the threat of criminal prosecution, many of the judges involved in the proceedings. In his various applications or appeals regarding his release from detention on remand, Ringeisen emphasized that the danger of committing further offenses of the type involved could no longer exist after he had lost the power of disposing of any of his assets through adjudication as a bankrupt.\textsuperscript{368} Nevertheless, the ground of danger of further offenses was upheld while the other one (danger of collusion) was dropped.\textsuperscript{369} When filing the indictment in the fraud case in April 1965,\textsuperscript{370} the prosecution requested the Regional Court to remand Ringeisen in custody in that case too, for danger of absconding and committing further offenses. The court complied with this request on May 12, 1965, giving detailed reasons why the grounds for detention existed in spite of Ringeisen’s former release in the fraud case in December 1963. The Regional Court of Appeal upheld this decision in May 1965. In both criminal cases, further applications for release were rejected in September 1965. An appeal in the fraudulent bankruptcy case was rejected by the Court of Appeal in December 1965, while no decision was rendered on an appeal in the fraud case.\textsuperscript{371} After Ringeisen’s conviction in the fraud case on January 14, 1966, the Regional Court granted an application for release. However, this

\textsuperscript{366} Id. at 21, 22.
\textsuperscript{367} Text accompanying note 360 supra.
\textsuperscript{369} Id. at 25, 28.
\textsuperscript{370} Note 361 supra.
was reversed on the basis of the prosecution’s appeal allowed by the Regional Court of Appeal on March 2, 1966, for the reason that both grounds for detention, danger of absconding and of further offenses, were not removed. Further applications followed in both cases but were rejected. In a decision of November 30, 1966, the Court of Appeal denied a release in the fraudulent bankruptcy case and noted, solely for the sake of completeness, that Ringeisen would not gain any substantial advantage by a release in these proceedings, since he was also provisionally detained in the fraud case. Upon a later application and appeal in the fraud case, the Court of Appeal decided on March 15, 1967, that Ringeisen should be released on his giving a solemn undertaking. The Court thought that after 2 and one-half years in detention, there was no longer any danger of Ringeisen absconding in order to avoid prosecution, even considering the sentence of October 18, 1966, of 5 years imprisonment. The danger of further offenses had ceased since several counts of the indictment had been eliminated and Ringeisen could no longer deal with the property still involved in the proceedings. Furthermore, the length of the past detention would deter him from committing further offenses. On the basis of this decision, Ringeisen also obtained a favorable decision in the fraudulent bankruptcy case and was released on March 20, 1967. His second detention on remand had lasted from March 15, 1965, to March 20, 1967.

The Commission accepted Ringeisen’s application with regard to the criminal proceedings as far as it concerned Article 5(3) of the Convention in reference to the length of the detention and Article 6(1) in reference to the length of the proceedings in both cases. In its report according to Article 31 of the Convention, the Commission stated this opinion: The applicant’s detention lasted beyond a reasonable time so that there was a violation of Article 5(3). Neither in the fraud case nor in the fraudulent bankruptcy case did the length of the criminal proceedings exceed a reasonable time, so there was no violation of Article 6(1).

The Court was called upon to decide, as far as the criminal proceedings are concerned, whether Articles 5(3) or 6(1) were vio-

367 Id. at 29.
368 Id. at 32.
369 Id. at 33. As to the judgment of October 18, 1966, see note 363 supra.
lated. It disposed briefly and unanimously of the issue of Article 6(1). It agreed with the opinion of the Commission that the length of both proceedings resulted from the complexity of the cases and from the innumerable requests and appeals brought by Ringeisen for his release, challenging many of the judges involved and seeking transfer of the proceedings to other courts. It concluded that there was no violation of Article 6(1).

As to Article 5(3) the Court stated that the detention had lasted altogether nearly 2 years and 5 months. It admitted that the first detention in the fraud case (from August 5 to December 23, 1963) could in itself not be considered because the last unfavorable decision about a release was rendered far more than 6 months before lodging the application with the Commission on July 3, 1965. Yet, the Court said, this period of about 4 and one-half months was to be added to the later periods of detention for judging the reasonableness of the whole period of detention in the fraud case. As to this point the Court referred to its reasoning in the Neumeister Case.

Because the whole second period of detention (from March 15, 1965 to March 20, 1967) occurred only in the proceedings for fraudulent bankruptcy, while in the fraud case it lasted for a somewhat shorter time (from May 12, 1965 to March 15, 1967), the Court first examined the reasonableness of the detention in the fraudulent bankruptcy case. It found the order of arrest of March 15, 1965 in the latter case somewhat surprising, as the facts involved in it had already been investigated thoroughly in the fraud case; it found also that in the fraudulent bankruptcy case no measures of investigation (except for interrogation of Ringeisen) were taken for 3 years. Though the arrest was as such justified under Article 5(1)(c) of the Convention, the Court had to assess the reasonableness of the period of detention under Article 5(3), which would involve examining the reasons given by the Austrian courts for the rejection of Ringeisen's requests for release. Remarking that in the fraudulent bankruptcy case detention was never based upon danger of absconding, it held unjustified the danger of collusion as a ground for detention, since, during the time of freedom (up to March 15, 1965) Ringeisen would have had ample opportunity to influence witnesses; the other

376 Id. at 34, 35.
377 Id. at 45, 46.
378 Text accompanying note 204 supra.
ground, danger of further offenses, the Court rejected as unreasonable from the date of adjudication as bankrupt (May 14, 1965), since Ringeisen then had lost any power to dispose of assets or to collect any payment. Accordingly, the Court considered the detention beyond May 14, 1965, in the fraudulent bankruptcy case unreasonable.

Regarding the causes for the second detention in the fraud case, danger of absconding and further offenses, the Court thought that no precise information or facts justifying these causes had been supplied. Rather it explained the second order of arrest in the fraud case with the fact that since May 15, 1965, Ringeisen was being held in the fraudulent bankruptcy case. It considered it as significant that on one occasion Ringeisen's appeals against decisions denying his release in both cases had lead to a further (negative) decision only in the fraudulent bankruptcy case. The Court then dealt with the Government's argument that the detention in the fraud case was removed from the application of Article 5(3) of the Convention with Ringeisen’s conviction on January 14, 1966, since from then on the detention became unconditionally subject to Article 5(1)(a). As to this point, the Government relied on the Court's judgment in the Wemhoff Case. The Commission suggested that Article 5(3) should remain applicable up to the final conviction, if, as was done in this case, the respondent State maintained up to this point the provisional character of the detention (on remand) and subjected it to the same conditions and afforded to the person detained the same remedies as before. The Court refused to go into this argument. As the detention in the fraud case fell entirely within the detention in the fraudulent bankruptcy case, the Court thought that it could be explained in fact only by the latter one and that therefore the fraud conviction on January 14, 1966, signified no change. It observed that at that time the prosecution objected to Ringeisen's release for the reason that the release would not help Ringeisen because of the still existing detention order in the fraudulent bankruptcy case. Also the Court of Appeal in November 1966 in denying a release in this latter case stated that Ringeisen would not be benefited by such a release because he was also detained in the fraud case. In all this it saw

380 Text accompanying note 371 supra.
381 Text accompanying note 177 supra.
382 Text accompanying note 373 supra.
the interconnecting link which at all times existed between the two detentions and therefore applied its finding of a violation of Article 5(3) of the Convention in the fraudulent bankruptcy case to the whole of Ringeisen's detention up to his release on March 20, 1967. It found a violation of Article 5(3) for the period from May 14, 1965 (date of adjudication as a bankrupt) to January 14, 1966 (first judgment in the fraud case). Further, there was a violation for the period from January 14, 1966 (first judgment in the fraud case) to March 20, 1967 (release of Ringeisen). The Court reserved for the applicant the right, should the occasion arise, to apply for just satisfaction as regards these violations.

Three dissenting opinions were filed regarding this part of the judgment. Judge Holmbäck briefly stated that he believed the Austrian authorities had sufficient reasons to refuse Ringeisen's request for release and therefore saw no violation of Article 5(3).384

Judge Verdross, (the Austrian Judge sitting ex officio) dissented regarding the violation for the period after the fraud conviction of January 14, 1966.385 He emphasized that the Court of Appeal which allowed the prosecution's appeal on March 2, 1966, expressly observed that the main reason for upholding the detention was the danger of absconding enhanced by his conviction for fraud so that this detention was not just a prolongation of the detention ordered in the fraudulent bankruptcy case. The same resulted, the Judge continued, from the Appeal Court’s remark in November 1966, that a release in the fraudulent bankruptcy case would not help Ringeisen because of his being held also in the fraud case in which he was sentenced to 5 years severe imprisonment in October 1966. Ringeisen's release, in March 1967 was ordered because the danger of flight and of further offenses had ceased in the fraud case, while the detention in the other case was terminated only as a consequence of the release in the fraud case. From this, the Judge concluded that from the first conviction the detention was mainly maintained by reason of danger of flight in the fraud case and therefore was no longer governed by Article 5(1)(c), but by Article 5(1)(a).

Judge Zekia in his dissent386 divided the detention period into these three parts: (1) from August 5, 1963 to December 23, 1963; (2)

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384 Id. at 52.
385 Id. at 50-51.
386 Id. at 53-56.
from March 15, 1965 to January 14, 1966 (date of conviction); (3) from January 14, 1966 to March 20, 1967 (date of release). He eliminated from consideration under Article 5(3) the third period, since it did not refer to a detention under Article 5(1)(c). He declined to assume that a detention ordered under Article 5(1)(c), even if not expressly revoked, could still be counted for the purpose of Article 5(3) after a conviction. He maintained this view also if an appeal against the conviction should have a suspensive effect, as the conviction replaced the presumption of innocence (guaranteed by Article 6(2) of the Convention) with a presumption of guilt and brought the case under Article 5(1)(a). Although he considered that the detention after the conviction was not one under Article 5(1)(a) since Ringeisen was then detained only by virtue of the detention order in the fraudulent bankruptcy case, he placed more importance on the conviction in the fraud case than on the other proceedings which may not have been substantiated by evidence and were later withdrawn. He conceded that the reasons for the post-conviction detention were not clear, but he claimed that if there was a valid reason for continuing the detention this was enough to take the case out of consideration under Article 5(3). He consequently held that the post-conviction detention could not be added to the other period in considering a violation under Article 5(3).

The Judge did not think that the first 4 and one-half months period of detention could establish a violation under Article 5(3) since it was not unreasonably long for the investigation of a great number of frauds. The Judge emphasized that the alleged numerous frauds preceded the fraudulent bankruptcy charges, which were investigated much later. In such circumstances the rearrest and holding in detention for the later group of offenses should be considered separately even if the later offenses were in some way related to the earlier ones.

Finally, Judge Zekia examined the second period of detention which lasted 10 months. He did not find that it constituted a violation under Article 5(3) because multiple alleged offenses had to be examined and Ringeisen himself, through his constant and unjustified applications and appeals, had unnecessarily prolonged the proceedings. In conclusion, he denied any violation of Article 5(3).

The case confirms the principle that a period of detention, though in itself not subject to scrutiny because of the effect of the time limit under Article 26 of the Convention, is still to be considered under the viewpoint of reasonableness of the total period of detention. Yet
its special aspect seems to be the fact that, for a greater part, the detention took place contemporaneously in two proceedings under two separate orders of detention. This complication in the procedure had to be unraveled. In this, each order should have been based exclusively upon the reasons for detention arising in the respective proceedings. Therefore, attempts of the Austrian prosecution and the Court of Appeal to justify one detention on the basis that a release would be futile because of the still existing order of detention in the other proceedings are obviously to be condemned. The Court went in the opposite direction. Somewhat formally it considered the whole period beginning in March 15, 1965, as dominated by the fraudulent bankruptcy order because it was the first in time to be issued and the last to be lifted. As a matter of substance, the detention was based, at least from the first conviction on January 14, 1966, mainly on the conviction for fraud and the Court should perhaps have considered the further detention in this light, i.e., under Article 5(1)(a) of the Convention which would have taken it out of the protection of Article 5(3). After doing this, whether the period from March 15, 1965, up to the conviction, even in connection with the first period of 4 and one-half months in 1963, was still unreasonable, may then appear doubtful.

L. Ringeisen Reparation Case

On the basis of the pronouncement by the Court that it reserved for the applicant the right, should be occasion arise, to apply for just satisfaction as regards the violations, Ringeisen with letter dated August 18, 1971, asked the Commission to apply to the Court in his behalf for a decision under Article 50. The Commission transmitted this letter to the Court on September 27, 1971. The President of the Court directed that this part of the case should be handled by the same Chamber that had given the Judgment of July 16, 1971. Ringeisen's lawyer had requested the Austrian Federal Minister of Justice to make proposals for the reparation of his loss consisting not only of the loss of his fortune but also of irreparable damage to his health. On September 10, 1971, i.e., more than 3 weeks after Ringeisen's application to the Commission, the Minister replied that for

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lack of his Ministry’s competence under the Austrian Constitution he could not deal with the matter. In some later letters to the Commission Ringeisen estimated his financial damages as of some hundred million schillings and asked for further compensation for personal injury and damage to his reputation in an amount which he left to the Court to assess.  

The Court divided its Judgement into three parts: (I) On the admissibility of the claim; (II) Fulfillment of the conditions for the application; and (III) Question of affording just satisfaction.  

As to (I), the Government contended that after the Court’s final judgment that (Article 52 of the Convention) the Court could entertain the claim for compensation only after a new petition was lodged with, and investigated by, the Commission and then referred to the Court. The Court rejected this argument. It noted that if the Government were right the Court could not deal with the application under Article 50 in its present composition since for each new case a new Chamber would have to be set up under Article 43, while proper administration of justice required that the damages should be adjudicated by the judicial body which had found the violation in question. It explained that the finality of the judgment established in Article 52 has only the meaning that the judgment is not subject to any appeal to another authority. To maintain that the Court could apply Article 50 only if it ruled on the damages in the same judgment in which it found a violation or if this judgment expressly kept the case open would be formalistic and alien to international law. It declared that the purpose of the reservation was to make it clear to the applicant that he could, if need be, obtain from the Court the award of just satisfaction under Article 50. Scrutinizing the procedural steps taken by Ringeisen, the Court found it normal that having no locus standi before the Court he presented his claims to the Commission which was duly seized of the case.  

As to II, the Government submitted that the prerequisites of Article 50 were not fulfilled since (1) the Austrian Courts had made full reparation by reckoning the entire time spent in detention on remand as part of the prison sentence and (2) assuming that this did not accomplish a restitutio in integrum and that the violation of

389 Text accompanying note 326 supra.
Article 5(3) had caused other damage, several internal remedies were available.

The Court rejected the first argument for the reason that, though the deduction of the detention on remand time from the prison sentence must be taken into consideration, it did not have the effect of a *restitutio in integrum* as no freedom was given in place of the freedom taken away unlawfully. In a situation like the Ringeisen Case the Government's view would deprive Article 5(3) of much of its effectiveness. Furthermore, it explained that if Ringeisen had been released on May 14, 1965, the day of his adjudication as a bankrupt from which date on his detention was judged by the Court to be in violation of Article 5(3), and had been rearrested after the final Austrian judgment to serve the remainder of his sentence, he would possibly have been released on probation for one-third of the prison term; this would have reduced his deprivation of liberty to 22 months, while his detention on remand had lasted almost 29 months.

As to the second argument the Court referred to what it had adjudged in the *Vagrancy Cases*, namely that Articles 26 and 27(3) of the Convention requiring exhaustion of domestic remedies are not applicable to claims under Article 50.\(^{391}\) The Court admitted that the Government had not invoked Article 26 nor insisted on exhaustion of domestic remedies prior to any consideration by the Court. It observed that a partial exercise of domestic remedies would only prevent the Court from speedily affording reparation. It conceded that in order for the Court to be able to act under Article 50 there should be a need to do so but saw this need in the refusal by the Government of the reparation. That Ringeisen had (in vain) applied to the Austrian Minister of Justice the Court explained with the fact that an Austrian Act of 1918 indicated this course of action for compensation for detention on remand.\(^{392}\)

As to III, Ringeisen made claims of various natures for reparation, among others for financial loss caused by the detention and for serious deterioration of his health while in prison. As to most of these claims the Court felt that Ringeisen had not brought sufficient proof. It concentrated, therefore, on the very fact that the detention exceeded a reasonable time by more than 22 months. It

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\(^{391}\) Texts accompanying notes 327-28 *supra*.

saw some compensation of the damage in the fact that the total
time of detention was reckoned as part of the sentence and that in
detention on remand Ringeisen was subjected to a regime less se-
vere than in penal service. Yet it also considered the fact that Ring-
eisen, protesting his innocence, felt the excessive detention on re-
mand as a great injustice, especially as it made it much more diffi-
cult for him to reach a composition in the bankruptcy proceedings.
Assessing the various factors the Court arrived in its judgement of
June 22, 1972 at a just satisfaction in the form of 20,000 German
Marks. Because of the pending bankruptcy the question arose as
to whether payment should go to Ringeisen or to the trustee in
bankruptcy for the benefit of the creditors. The Court declared
that it could leave this point to the discretion of the Austrian au-
thorities. The Court referred to two Austrian statutes dealing with
compensation for detention on remand both of which contain the
 provision that "no attachment or seizure may be made against the
right to compensation except to procure payment of maintenance as
provided for by law." It intimated that the same exemption should
be allowed as to a compensation due under a decision of the Court
regarding a violation of Article 5(3) of the Convention.

In a "separate declaration," Judges Holmbäck and Wold declared
that as to the jurisdiction of the court they referred to their joint
separate opinion to the reparation judgment of March 10, 1972 in
the Vagrancy Cases. Judge Holmbäck also declared that, after his
dissent from the main judgment of July 16, 1971, in the present case
regarding the presence of a violation of Article 5(3) had been over-
rulled, he agreed with the amount of compensation awarded on the
basis of a violation of Article 5(3).
Judge Verdross' declaration referred to his separate opinion to
the main judgment of July 16, 1971, in the Ringeisen case in which
he dissented as to the calculation of the unreasonable time of de-
tention on remand. He also recalled his separate opinion to the
reparation judgment of March 10, 1972, in the Vagrancy Cases in
which he dissented from the interpretation by the Court of Article

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293 The Court gave no explanation why the payment should be made in German Marks
instead of in Austrian Schillings. See as to this point infra text accompanying note 416.
295 Text accompanying note 331 supra.
296 Text accompanying note 384 supra.
297 Text accompanying note 385 supra.
50. However, citing Rule 48 of the Rules of Court under which, as he stated it, "a Chamber may not, of its own will decline to follow an interpretation of the Convention given by the plenary Court or a Chamber," he felt obliged to take those judgments as a basis for the present judgment.

Judge Zekia, referring to his separate opinion to the main judgment of July 16, 1971, in this case, made a declaration substantially identical with the individual declaration by Judge Holmbäck.

Because of the references back to the separate opinions in the Vagrancy Reparation Case, it appears desirable to weigh the Vagrancy and Ringeisen Reparations judgments together in the light of the separate opinions to the Vagrancy judgments.

Judge Zekia's dissent from the Vagrancy Reparation judgment of March 10, 1972, referred only to the denial of damages with regard to the expenses of the proceedings before the Commission and the Court. The Court appeared sufficiently justified in denying those damages on the basis of the fact that free legal aid had been extended to the claimants.

Approval has herein been expressed of the Court's rejection in the Vagrancy Reparation judgment of the requirement of exhaustion of domestic remedies in the sense of Articles 26, 27(3) before making claims under Article 50. In the Ringeisen Reparation Case the Court had occasion to elaborate on the admissibility of claims under Article 50. That admissibility was opposed by the Government argument that the finality of the main Judgment under Article 52 required a completely new petition lodged under Article 25 with the Commission in order to obtain a reparation judgment from the Court. The reasons expounded by the Court against this argument appear convincing.

The separate opinions in the Vagrancy Reparation Cases other than Judge Zekia's center around the scope of the jurisdiction of the Court under Article 50. Judge Verdross seems to come closest to the majority opinion. He seems to agree that this question is to be answered out of the wording of Article 50 and independently from

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398 Text accompanying note 332 supra.
399 Text accompanying note 386 supra.
400 Text accompanying note 338 supra.
401 Text accompanying note 330 supra.
402 Text accompanying note 329 supra.
403 Text accompanying note 338 supra.
404 Text accompanying note 390 supra.
the scope of other treaties that formed its background and that Article 50 gives the Court competence to grant, if necessary, just satisfaction also in cases where, as in the Vagrancy Cases, the nature of the injury makes _restitutio in integrum_ impossible. He recommends an intermediate attitude between the requirement of exhaustion of domestic remedies in the reparation stage (rightly rejected by the Court) and the somewhat largeminded way of the majority which sees in the mere refusal of the Government to grant compensation a sufficient opening for the Court's going into the merits of the question of compensation. He concludes that the Court should first give the Government a chance for a domestic judicial adjudication of compensation before taking up its merits.405 His point seems to be well taken.

Judges Holmbäck, Ross and Wold argue that the maxim of _im possibilitium non est obligatio_ overcomes the conclusion of the Court that Article 50 covers the situation where the very nature of the injury results in the impossibility of _restitutio in integrum_. This is not convincing. Article 50, it seems, has the very purpose of creating a substitute for the nonexistent obligation in order to achieve an equitable result where this substitute is necessary. In the _Vagrancy Reparation_ judgment the Court dealt effectively with the further argument of this separate opinion that Articles 5(5) and 13 of the Convention are an obstacle against the wide competence of the Court in reparation matters.406

The gist of Judge Mosler's separate opinion seems to be his statement that, though general international law establishes a right to compensation for an injury established by an international court, it was necessary to confer upon the Court competence to grant satisfaction by an express provision of the Convention. For the party injured is not a party to the proceedings before the Court whose basic task is not to ascertain an injury to a person but a violation of the Convention. This express provision gives the Court jurisdiction to decide as to all damages no matter whether domestic law allows, does not allow, or allows only partial reparation. The text of Article 50 which is broader than those of the model treaties does not restrict the jurisdiction to cases involving _restitutio in integrum_ or compensation for an irreversible act causing damage. The consider-

405 Text accompanying note 332 _supra_.
406 Text accompanying note 331 _supra_ and text accompanying note 431 _infra_.

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ation of domestic law as to reparation shall preserve to the respon-
dent State the option of voluntary compliance with the main judg-
ment without going to the extreme of demanding an exhaustion of
local remedies. In this regard Judge Mosler seems to follow Judge
Verdross' sound approach.\textsuperscript{407}

M. Ringeisen Interpretation Case

The \textit{Ringeisen Reparation} judgment was not the end of the pro-
ceedings regarding the application of Article 50. On December 21,
1972, within the period of 3 years fixed by Rule 53(1) of the Rules
of Court\textsuperscript{408} regarding a request for interpretation of a judgment, the
Commission filed a request with the Court, appending also a letter
by Ringeisen to the Commission of October 9, 1972, having the same
aim.\textsuperscript{409} Under rule 53(4) of the Rules of Court the same Chamber
that previously rendered the \textit{Ringeisen Reparation} judgment of
June 22, 1972, considered the request of the Commission.\textsuperscript{410} How-
ever, as two members of the Chamber had died and a third Judge
was unable to take part, three Substitute Judges were called upon
to sit.\textsuperscript{411} Following the strict requirements of Rule 53(2) of the Rules
of Court the Commission submitted to the Court these two ques-
tions: "First, what was the intended effect of the order for payment
of compensation in D. Marks, particularly in respect of the actual
currency and place of payment? And Secondly, whether the term,
'compensation' is to be understood as payment of a sum free of any
lawful claims made against it under Austrian law, or subject to such
claims?" In its judgment of the \textit{Ringeisen Interpretation Case} of
June 23, 1973, the Court, before going into the questions of law,
cited the following facts: it had been known throughout the case
that Ringeisen was and for some time had been residing in Heidel-
berg in the Federal Republic of Germany from where he asked the
Austrian Government in July 1972 to pay the 20,000 German Marks

\textsuperscript{407} Text accompanying note 334 \textit{supra}.
\textsuperscript{408} \textbf{COLLECTED TEXTS, supra} note 78, at 422.
\textsuperscript{410} Text accompanying notes 387 \textit{supra}.
\textsuperscript{411} \textit{Ringeisen Case, [1975] 16 Eur. Ct. Human Rights} 4. The judgment does not say that
the President of the Chamber drew by lot the names of these substitute Judges. From this it
may be concluded that the substitute Judges "called upon to sit" were the ones whose names
had been drawn to be substitute Judges in the main case but were not revealed in the
awarded by the judgment of June 22, 1972. On the other hand, several parties laid claim in Austria to that money on the basis of debts alleged to be due to them by Ringeisen. On behalf of the Republic of Austria the Attorney General’s office applied in July and August 1972 under Article 1425 of the Austrian Civil Code to the Vienna Central District Court for acceptance of 143,808 schillings, the equivalent of 20,000 German Marks, to the credit of four claimants, among them Ringeisen. This sum of schillings was deposited and on September 1, 1972, the District Court acknowledged receipt of the money and declared it would be paid out on application in writing by the beneficiaries or pursuant to a final court order. Of this the Committee of Ministers, responsible for supervising the execution of the Court Judgment of June 22, 1972, under Article 54 of the Convention was notified by Austria’s representative to the Council of Europe. In the letter of October 9, 1972, to the Commission and transmitted by it to the Court, Ringeisen emphasized his poor state of health and lack of means and asked the Court to interpret its judgment of June 22, 1972, as if its operative part read that Austria had to pay the applicant at once 20,000 German Marks free from all seizure or attachment at his Heidelberg address and to reimburse all damage and expenses suffered after June 22, 1972.\textsuperscript{412}

The Government contended in these proceedings that the Commission did not in fact ask for an interpretation of the judgment of June 22, 1972, but sought to induce the Court to supplement unlawfully the “entirely clear” operative provisions and reasons thereof and even to interfere with the supervisory function of the Committee of Ministers under Article 54. It doubted whether the competence of the Court to interpret its judgments, based solely on the Rules of Court, is compatible with the Convention in the light of its Article 52 under which the Court’s judgments are final.\textsuperscript{413}

Regarding the last argument the Court recalled its statement in the reparation judgment of the Ringeisen case that the sole meaning of Article 52 is to make the Court’s judgment not subject to any appeal to another authority.\textsuperscript{414} It did not consider a request for interpretation directed to the Court itself to be an appeal but saw in its consideration only an exercise of the Court’s inherent jurisdic-

\textsuperscript{413} Id. at 7, 8.
\textsuperscript{414} Text accompanying note 390 supra.
tion to clarify the meaning and scope of its previous decision, completely compatible with Articles 52 and 54 of the Convention. It recalled that the Austrian Government itself once had envisaged availing itself of Rule 53 of the Rules of Court the validity of which it now tried to doubt.\textsuperscript{415}

Regarding the substance of the request for interpretation the Court held, as to the first question, that it intended that the compensation of 20,000 DM should be paid to Ringeisen in German Marks and in the Federal Republic of Germany. It took into account the uncontested residence of Ringeisen in the Federal Republic of Germany, and the oral submission of the Commission in the reparation proceedings when it asked the Court to rule whether any compensation due Ringeisen for violation of Article 5(3) of the Convention "should not be paid to him without delay in view of his state of health and needy situation."\textsuperscript{416}

As to the second question the Court held that by the term "compensation" it meant that an award was to be paid as compensation for nonmaterial damage to Ringeisen personally and free from attachment. It explained that in referring to the discretion of the Austrian authorities it did not qualify its intentions by a limitation; the two Austrian statutes\textsuperscript{417} were mentioned only to indicate that direct payment to Ringeisen was all the more justifiable because the freedom of payments of this kind from attachments was applied also by Austrian law in analogous cases. It stated that it had entrusted to the discretion of the Austrian authorities the practical execution of the measures ordered in conformity with this principle.\textsuperscript{418}

Judge Verdross, the Austrian member of the Court, in a separate opinion agreed that the Court had jurisdiction to interpret its judgments but disagreed as to the substantive issue. In his opinion the power of the Court under Article 50 of the Convention did not embrace the competence to restrict the rights of creditors of the applicants. He assumed that the Judgment of June 22, 1972, was not to exceed the jurisdiction conferred by the Convention. From this, he concluded that the Court's statement that it can leave this point

\textsuperscript{416} Id. at 8, 9.
\textsuperscript{417} Text accompanying note 394 supra.
(payment to the applicant free from attachment) to the discretion of the Austrian authorities—who could apply, by analogy, the Austrian statutes mentioned by the Court—must be interpreted literally, because the Court could and should clearly have said if it intended to oblige Austria to act differently. He agreed with the Government's action to deposit the money and to leave it to the domestic court to apply the Austrian law to this case. He dissented from the operative provision of the judgment of Interpretation as construed by the reasons given in it.\footnote{Id. at 11.}

Judge Zekia, in his separate opinion, agreed with the jurisdiction of the Court to interpret its judgment and with the implication that the award, expressed in German currency, was to reach Ringeisen in the Federal Republic of Germany, given the fact known to the Court of Ringeisen's residence there. Regarding the other substantive issue he felt that the Court when issuing its Reparation judgment expected Austria to make payment free from claims and attachment, yet he emphasized that the Court did not take a firm stand of imposing an obligation to pay in this manner. On the contrary, it clearly left this question to the discretion of the Austrian authorities and the Austrian government properly exercised its discretion though perhaps not strictly in the way indicated by the Court. The reference by the Court to the two Austrian acts he considered together with leaving the issue to the discretion of the Austrian authorities only as an obiter dictum without binding effect on the party concerned.\footnote{Id. at 12, 13.}

The Interpretation judgment is of interest, being the first of its kind pronounced by the Court. It rightly reaffirms the jurisdiction of the Court spelled out in Rule 53 of the Rules of Court to interpret ambiguities of the judgment rendered by it. It appears that such an ambiguity existed and was well interpreted as to the questions of the currency and place of payment involved. As to the question of freedom of the payment from all attachment, the dissenting opinions seem to carry considerable weight. The words used in the original reparation judgment leave little room for doubt that this question was to be resolved by the Austrian authorities so that there was probably in this regard no ambiguity open to a new judgment of interpretation.
N. Neumeister Reparation Case

As mentioned before the decision in the Neumeister Case that there had been a breach of Article 5(3) of the Convention led to a proceeding under Article 50 in which the Court rendered judgment on May 7, 1974. Neumeister was sentenced on July 2, 1968, a few days after the Court had issued its Judgment of June 27, 1968, to 5 years severe imprisonment for aggravated fraud. The total periods of detention on remand (from February 24 to May 12, 1961, and from July 12, 1962, to September 16, 1964) were reckoned as part of the sentence which was upheld by the Supreme Court in decisions of June 16 and November 4, 1971. Neumeister presented to the Austrian Federal Ministry of Justice in December 1970 a claim for a provisional overall sum of 3,500,000 schillings in reparation of the damage he was alleged to have sustained through the violation established by the Court. On March 17, 1971, the revenue department of the Attorney General's office rejected the claim, stating that it was not entitled to grant such compensation under the existing law. Considering this as a final decision, Neumeister submitted his claim to the Commission with reference to Articles 5(5) and 50 of the Convention on September 16, 1971. He requested the Commission to initiate the proceedings provided for in this connection. The Commission transmitted the request to the Court on September 27, 1971. As in the Ringeisen Case the President of the Court directed that the Chamber that had given the judgment of June 27, 1968, in the main Neumeister Case should examine the reparation aspect; some changes of its composition were necessitated by death or other reasons of elimination of some of the original Judges. The reparation proceedings of the Court were greatly delayed by lengthy negotiations between Neumeister and the Austrian authorities toward a friendly settlement, to include a pardon concerning the remaining part of the prison sentence. Those negotiations led to the

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421 Text accompanying note 211 supra.
423 Text accompanying note 195 supra.
424 Neumeister Reparation Case, supra note 422, at 4, 5.
425 Note 387 supra and accompanying text. By then, Rule 50(3) of the Rules of Court had become applicable in its amended form.
426 Neumeister Reparation Case, supra note 422, at 5.
grant of a remission of February 14, 1973, having the effect of a conditional sentence subject to a probationary period of 3 years (solely conditioned by the Austrian Act on conditional sentences). Further delay was caused by inquiries of the Court into the details of those negotiations.\textsuperscript{127}

The judgment of the Court of May 7, 1974, dealt first with two procedural questions and then with the merits of Neumeister's claim.\textsuperscript{128} The first procedural question was whether Article 50 was applicable at all. The Austrian Government claimed that the Commission, instead of transmitting Neumeister's claim to the Court, should have considered it as an application lodged under Article 25 and alleging a violation of Article 5(5) of the Convention: "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." It submitted that Article 5(5) is a *lex specialis* in relation to Article 50 so that the latter article does not apply in cases of violation of freedom of the person and that Neumeister, according to the wording of his letter of September 16, 1971, had apparently understood it to be an application under Article 25. The Government at one point in the reparation proceedings also relied on the text of Articles 50 and 52 and on the fact that the main Judgment of June 27, 1968, had omitted in its operating provisions to reserve to Neumeister the right to apply for just satisfaction.\textsuperscript{129}

Regarding the first argument the Court admitted that subjectively the letter of September 16, 1971, could possibly have had the meaning given to it by the Government. But it countered this by saying that, whatever may have been Neumeister's intentions, the Court had to determine whether the Convention requires or authorizes in such a case the procedure which the Commission had chosen to follow. It referred back to the *Ringeisen Case* where it had implicitly rejected the position already taken by the Government in holding Ringeisen's claim for compensation to be admissible.\textsuperscript{130} It explained that Articles 5(5) and 50, though both dealing with compensation are on different levels; the first is a rule of substance, guaranteeing an individual right among others established in Section I

\textsuperscript{127} Id. at 6-12.
\textsuperscript{128} Id. at 12-21.
\textsuperscript{129} Id. at 12.
\textsuperscript{130} Id. at 13 and text accompanying note 390 supra.
of the Convention and the second is a rule of competence of the Court in the frame of Section IV of the Convention. Held together, the Court found that in the exercise of the wide competence conferred by Article 50 it must take into consideration all the rules of substance including both Articles 5(3) and 5(5). To require two successive petitions to the Commission, on each of which the Court or the Committee of Ministers could be called upon to rule, would mean an extremely slow pace in the case of Article 5. The Court concluded that the proceedings no longer fell within Section III of the Convention (dealing with the Commission) but were a final phase of the proceedings under Section IV so that the claim could not be dealt with as a new petition presented under Article 25 and the Commission was right to transmit it to the Court. The last argument of the Government the Court brushed aside with a special reference to its holdings in the Ringeisen Case. In the operative part of its judgment of May 7, 1974, it found unanimously that Article 50 was applicable.

The second part of the Judgment was directed to the question of whether Neumeister, during the extended dealings with the Austrian authorities aimed at the granting of a pardon, had waived his claims for pecuniary compensation should he obtain remission of the unserved part of his prison sentence. The Court, after evaluating the facts, denied this. It emphasized, however, that even if it had reached the opposite conclusion it could not, because of its responsibilities under Article 19 of the Convention, terminate the proceedings without first being satisfied that the aim of Article 50 had been achieved. On the other hand, it admitted that a declaration of an applicant that he would settle for the satisfaction obtained or to be obtained from the Government might be an important or even a decisive factor for the Court's assessment of the just character of that satisfaction within the meaning of Article 50.

On the basis of these procedural preliminaries the Court approached the question as to the merits of Neumeister's claim. Yet

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3 Neumeister Reparation Case, supra note 422, at 13, 14. The Court referred back to its judgment of March 10, 1972 in the Vagrancy Reparation Cases. See text accompanying notes 327-28 supra.


31 Neumeister Reparation Case, supra note 422, at 21.

30 Id. at 14-16.

29 Id. at 15-16.

28 Id. at 16-21.
also in the context of this examination some procedural aspects had to be considered. The Court realized that in the main judgment of June 27, 1968, it had not determined from which point in time Neumeister’s second detention on remand (from July 12, 1962 to September 16, 1964) had become unreasonable. It explained this by saying that this has not been done since Neumeister had not as yet claimed damages. Rejecting Neumeister’s view that the main judgment implied that the second detention was in breach of Article 5(3) ab initio, it arrived at the conclusion, on the basis of the facts involved, that the second detention amounted to a violation approximately from March 1, 1963. Due to this finding the Court reasoned that only damages proved to have resulted from the detention beyond that point of time could be considered. Even supposing that some damages so caused existed, the Court considered the reckoning of the total detention toward the sentence and the remission of the remaining part as counterweights since further imprisonment would inevitably have caused adverse consequences in Neumeister’s business. Considering also Neumeister’s indications in his endeavors to obtain the remission that it would be the best possible form of reparation, the Court arrived at the decision to deny satisfaction for material damage.\(^{47}\) The Court applied this reasoning also for rejecting moral damage suffered by reason of the detention beyond a reasonable time, stressing that Article 50 provides for just satisfaction only if necessary.\(^{48}\) Finally, the Court dealt with Neumeister’s claim of about 250,000 schillings for lawyers’ fees. It was of the opinion that the reasons for dismissing the claims for material and moral damages, among them especially the granting of the remission, do not necessarily apply to the expenses incurred by Neumeister in vindicating his rights guaranteed by the Convention. It distinguished between damage caused by a violation of the Convention and the necessary costs of trying to prevent such violation, to have it established by the Commission and the Court, and to obtain just satisfaction. Noting that Neumeister did not receive legal aid either before the Commission or with the Commission’s Delegates after referral to the Court, it arrived at a sum of 30,000 schillings taking as a basis for calculation the rates payable under the scheme for free

\(^{47}\) Id. at 16-19.

\(^{48}\) Id. at 19. The Court referred in this regard to the Vagrancy Reparation Judgment; see text accompanying note 329 supra.
legal aid operated by the Commission and Delegates of the Commission. The Court held unanimously that the reparation claim was not wellfounded, except for attorney's costs for which the Republic of Austria was to pay the applicant the sum of 30,000 schillings.

The judgment presents an important clarification of the relation between Articles 5(5) and 50 of the Convention. The position it took appears well founded. As to the second part it could seem disturbing that the Court, in the frame of a judgment of reparation under Article 50, actually made a new determination not rendered in the main judgment as to the point in time from which the detention on remand constituted a violation of Article 5(3). It can, however, be argued that without such a determination the Court could not have arrived at fulfilling its duty under Article 50 to find and adjudicate just satisfaction. Of special interest is the point that the Court, though denying reparation for material or moral damages on the basis of the facts involved, afforded reparation for the costs for bringing about an adjudication under the Convention of the violation of one of the rights guaranteed by it, including those of the proceedings toward obtaining reparation. This point appears well taken.

O. Golder Case

The Golder Case originated in an application and later supplement by Sidney Elmer Golder, a United Kingdom citizen, lodged with the Commission in 1969 and April 1970, in which he complained of violations of Articles 6(1) and 8 of the Convention. The Commission declared, on March 30, 1971, that the first application was inadmissible because all domestic remedies had not been exhausted, but accepted the other for consideration of the merits under Articles 6(1) and 8 of the Convention. After failing to reach a friendly settlement, the Commission drew up its Report in accordance with Article 31 of the Convention and transmitted it to the Committee of Ministers on July 5, 1973. In it the Commission

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439 Neumeister Reparation Case, supra note 422, at 19-21.
440 Id. at 21.
expressed the opinion that there were violations of Articles 6(1) and 8 of the Convention. The government of the United Kingdom, under Article 48 of the Convention, referred the case to the Court on September 27, 1973. It requested the Court to hold that there had been no violation by the United Kingdom of Articles 6 and 8 of the Convention. The competent Chamber of the Court unanimously decided on May 7, 1974, according to Rule 48 of the Rules of Court, to relinquish jurisdiction in favor of the plenary court, for the reason that "the case raises serious questions affecting the interpretation of the Convention." The elected Judge, a national of the United Kingdom, sitting ex officio under Article 43 of the Convention, was Sir Gerald Fitzmaurice. The question raised was whether Article 6(1) of the Convention, in addition "to guaranteeing in substance the right to a fair trial in legal proceedings which are already pending," also secures "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."

In 1969 Golder was serving a sentence of imprisonment of 15 years for robbery with violence in Parkhurst Prison on the Isle of Wight. On the evening of October 24, 1969, a serious disturbance occurred in a prison area where Golder happened to be. The next day, Laird, a prison officer, identified his assailants and in his statement declared that together with others "another prisoner whom I know by sight, I think his name is Golder" was swinging vicious blows at me. Golder was thereupon, together with other suspected prisoners, segregated from the main body of prisoners. In an interview he was informed that it had been alleged that he had assaulted a prison officer and was warned that the facts would be reported to consider

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44 Id. at 10-11.
45 Id. at 6. The referral was within the period of three months prescribed in Articles 32(1) and 47.
46 Id. at 11.
47 Id. at 3.
48 Id. at 6.
49 Id. at 12. Article 6(1) of the Convention reads: "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 required, or to the extent strictly necessary in the opinion of the Court in special circumstances were publicity would prejudice the interests of justice."
whether or not he should be prosecuted for assaulting a prison officer. Golder wrote to his Member of Parliament and to a Chief Constable about the disturbance and the hardships that resulted for him therefrom. The prison governor stopped these letters since Golder had not raised this subject through the authorized channels beforehand. On November 5, 1969, Laird qualified his former statement, saying that when he had mentioned Golder he had said, "I think it was Golder" who was present when others attacked him, and that he certainly remembered seeing him in the immediate group, but was not absolutely certain that Golder himself had made an attack on him. On November 7, 1969, another prison officer reported that Golder was with prisoners who did not participate in the disturbance in a television room and, to the best of his knowledge, took no part in the riot. Golder was thereupon returned to his ordinary cell the same day. Entries relating to possible charges against Golder were made in his prison record but were later marked "charges not proceeded with" and finally expunged from the prison record in 1971 during the examination of applicant's case by the Commission. Golder was released on parole on July 12, 1972.450

On March 20, 1970, Golder petitioned the Home Secretary. He asked for a transfer to some other prison and added that he understood that an incorrect statement by Laird was in a prison record and had prevented his parole. He requested permission to consult a solicitor with a view of taking civil action for libel for that statement or, alternately, for an independent examination of the matter by a certain magistrate. On April 6, 1970, the Home Office had Golder notified that none of the requests would be granted.451

The Court, in its judgment of February 21, 1975, started by saying that the Home Office's act in preventing Golder from contacting a solicitor cannot be judged strictly from the viewpoint of interference with correspondence to the exclusion of all questions of accessibility

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451 Id. at 10. According to the English Prison Act of 1952 and the Regulations issued under it, a prisoner shall (except as provided otherwise) not be permitted to communicate with any outside person without leave of the Secretary of State; he shall not be entitled to communicate with any person in connection with any legal or other business except with the leave of the Secretary of State. The Act further provides that the legal advisor of a prisoner in any legal proceeding, civil or criminal, in which the prisoner is a party shall be afforded reasonable facilities for interviewing him out of hearing but in the sight of an officer, and a prisoner's legal advisor may, with the leave of the Secretary of State, interview the prisoner in connection with any other legal business in the sight and hearing of an officer. Id. at 9, 10.
to the courts and that a court in England would not dismiss an action by a convicted prisoner on the sole ground that he had managed to obtain the writ without leave from the Home Office under the prison rules. It admitted that Article 6(1) does not state a right of access to the courts in express terms; yet the Article enunciates distinct rights stemming from the same basic idea which, taken together, make up a single right not specifically defined. The Court concluded from this that it had to ascertain whether access to the court constitutes one aspect of this right by means of interpretation.452

Following the submissions of the Government453 and the Commission,454 the Court leaned in its interpretation of the Convention upon

452 Id. at 13.
453 Before the Court, the Government submitted that Article 6(1) confers only a right in any proceedings to a hearing that is fair and in accordance with the other requirements of the paragraph and that therefore the Government’s refusal to allow the applicant to consult a lawyer was not violative of Article 6. In the alternative, if the Court found that the rights conferred by Article 6 include a general right of access to the courts, this right is not unlimited in the case of persons under detention. It further submitted that therefore a reasonable restraint on recourse to the courts for the applicant was permissible in the interest of prison order and discipline and thus the Government’s refusal did not violate Article 6. The control over the prisoner’s correspondence was a necessary consequence of the deprivation of his liberty and therefore not violative of Article 8(1) and in any case within the exception of Article 8(2) since the restriction was in accordance with law and within the Government’s power to find that the restriction was necessary in a democratic society for the prevention of disorder or crime.

454 The Commission submitted to the Court for their consideration the following questions:

(1) Does Article 6(1) of the Convention secure to persons desiring to institute civil proceedings a right of access to the courts?

(2) If so, are there inherent limitations to this right, or its exercise, applicable to the facts of this case?

(3) Can a convicted prisoner who wishes to write to his lawyer in order to institute civil proceedings, rely on the protections of Article 8 to respect for correspondence?

(4) Do the facts of this case, according to the answers to questions 1-3, disclose a violation of Articles 6 and 8?

Id. at 11, 12. After declaring Golder’s application inadmissible as to the stopping of his letters by the prison governor, but accepting it with regard to the refusal of the Home Secretary to permit him to consult a solicitor (for consideration of his claim under Articles 6(1) and 8 of the Convention) the Commission had expressed in its Report the following opinion:

• unanimously, that Article 6(1) guarantees a right of access to the courts;

• unanimously, that in Article 6(1), whether read alone or together with other Articles of the Convention, there are no inherent limitations on the right of a convicted prisoner to institute proceedings and for this purpose to have unrestricted access to a lawyer; and that consequently the restrictions imposed by the present practice of the United Kingdom authorities are inconsistent with Article 6(1);

• by seven votes to two, that Article 8 is applicable to the facts of the present case;
Articles 31-33 of the Vienna Convention of the Law of Treaties. It did so, although that Convention has not yet entered into force and, according to its Article 4, is not retroactive. Articles 31-33 of the Vienna Convention essentially express generally accepted principles of international law, including the one stated in Article 5 of the Vienna Convention that the interpretation must also be guided by "any relevant rules of the organization" (here the Council of Europe) within which the treaty (European Convention on Human Rights) was adopted.

With regard to the question of a right of access to the courts, the court emphasized that in the French text of Article 6(1) the word "cause" means not only "procès qui se plaide" as the Government the wider "l'ensemble des claims but also intérêts à soutenir, à faire prévaloir," and that "contestation" claim generally exists prior to the legal proceedings and is a concept independent of them. As to the English text, it observed that the phrase "in the determination of the civil rights and obligations" does not necessarily refer only to judicial proceedings already pending but can also be synonymous with the phrase "wherever his civil rights and obligations are being determined." This would imply the right to have the determination of disputes relating to civil rights and obligations made by a court or "tribunal." The Court admitted that the right to fair and expeditious judicial procedure can only apply to proceedings in being, but it denied that this excludes a right to the very institution of such proceedings. It mentioned that in criminal matters the "reasonable time" may start to run from a date prior to the seisin of the "tribunal" and that conceivably it may also begin to run in civil matters before the issue of the writ commencing the court proceedings.

A further argument circled around the relation between Article 6(1) and Articles 5(4) and 13. The expressly established access to the courts in the latter articles seemed to the Government to be a

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by eight votes to one, that the same facts which constitute a violation of Article 6(1) constitute also a violation of Article 8.

that the right of access to the courts guaranteed by Article 6(1) is not qualified by the requirement "within a reasonable time."

Id. at 10, 11.


Id. at 14-15.
clear indication that the lack of an express provision in Article 6(1) excludes such a right in its connection and that a different interpretation would make Articles 5(4) and 13 superfluous. The Commission replied that Articles 5(4) and 13, as opposed to Article 6(1), are "accessory" to other provisions, and that they do not state a specific right but are designed to afford procedural guarantees for the "right to liberty" (Article 5(1)) as to the whole of the "rights and freedoms as set forth in this Convention" (Article 13), while Article 6(1) shall in itself protect the right to a proper administration of justice of which the right that justice should be administered is an essential element. It further stated that this difference also explains the contrast between the wording of Article 6(1) and that of Articles 5(4) and 13.458

The Court saw no danger of confounding Article 6(1) with the two other provisions nor of making Articles 5(4) and 13 superfluous if Article 6(1) is given the wider meaning. Article 13 requires an "effective remedy before a national authority" which need not be a tribunal or court in the sense of Articles 6(1) and 5(4). "Effective remedy" deals with a violation of a right guaranteed by the Convention while Articles 6(1) and 5(4) cover civil rights and arrest or detention, respectively. None of these three groups of rights necessarily coincide with any one of the others. The requirements of Article 5(4) are somewhat stricter than those of Article 6(1), particularly with respect to the element of "time."459

In deference to Article 31(2) of the Vienna Convention, the Court quoted from the Preamble to the European Convention the passage that the signatory Governments are "resolved as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" of Human Rights proclaimed by the General Assembly of the United Nations of December 10, 1948. The Court admitted the selective nature of the protected

458 Id. at 15. Article 5(4) reads: "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." Article 13 reads: "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." Convention, supra note 25.

rights and that the Preamble does not include the rule of law as an object or purpose of the Convention, yet pointed to it as being one of the features of the common spiritual heritage of the Member States of the Council of Europe. It saw in this reference more than a theoretical reference without relevance in the interpretation of the Convention; it rather considered the profound belief in the rule of law as one reason why the signatory Governments took the first steps for the collective enforcement of certain human rights. Following the rules of Article 31(1) of the Vienna Convention, the Court bore this in mind when interpreting the terms of Article 6(1) in good faith, in accordance with its context and in light of the object and purpose of the Convention. The Statute of the Council of Europe, of which each signatory State to the Convention is a Member, affirms the devotion of its Members to the rule of law (Preamble of the Statute) and requires that every Member must accept this principle.\(^\text{460}\)

In civil matters the Court said one can scarcely conceive of the rule of law without access to the courts; "any relevant rules of international law applicable in the relations between the parties" to the treaty\(^\text{461}\) and especially the "general principles of law recognized by civilized nations"\(^\text{462}\) have to be taken in account together with the context of the provisions to be interpreted. The principles contested here ranked among the universally recognized principles of law. Article 6(1) must be read in the light of these principles of law and the principle of international law which forbids the denial of justice. Should Article 6(1) concern only the conduct of an action already initiated before a court, a State could do away with its courts entirely or entrust certain classes of civil actions to organs dependent on the Government. Such a result would be repugnant to the principles mentioned. The fair public and expeditious characteristics of judicial proceedings are of no value if there are no judicial proceedings.\(^\text{463}\)

The Court concluded that the right of access is inherent in the right stated in Article 6(1). It said that it arrived at this result without "an extensive interpretation," but on the basis of the very terms of the first clause of Article 6(1) "read in its context and

\(^{460}\) Id. at 16, 17; Art. 3 of the Statute.

\(^{461}\) Vienna Convention, supra note 455, art. 31(3)(c).

\(^{462}\) Statute of Int'l Ct. of Justice, supra note 159, art. 38(1)(c).

having regard to the object and purpose of the Convention,” and “to the general principles of law.” It denied any need for “supplementary means of interpretation” as described in Article 32 of the Vienna Convention.464

The Court then considered whether its basic interpretation of Article 6(1) had any built-in limitations that could justify the action of the Home Office. It admitted that certain limitations could exist such as special regulations relating to minors or persons of unsound mind. The Court denied that it was its function to elaborate a general theory of limitations applicable in the case of convicted prisoners or to rule “in abstracto” on the compatibility of the Prison Rules with the Convention; rather, it restricted itself to a decision on whether or not the application of those rules in the present case violated the Convention to the prejudice of Golder.465

In arriving at a decision on this point the Court recalled that Golder was seeking to exculpate himself of the charge made by Laird that resulted in unpleasant consequences to him. It recognized that the contemplated libel proceedings would have been directed against action of a prison official in the course of his duties, an official subject of the Home Secretary’s authority. It held that it was not for the Home Secretary, but for an independent court, to rule on any claim that might be brought, and that in denying the leave requested the Home Secretary had violated Golder’s right to go before a court as guaranteed by Article 6(1).466

The Court then dealt with the opinion of the Commission that the stated facts also violated Article 8 of the Convention dealing with the freedom of correspondence.467 It emphasized that the Home Secretary’s prevention of Golder from initiating a correspondence with a solicitor is the most far-reaching form of “interference” forbidden in Article 8(2), and that it would be paradoxical to say that Golder,

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464 Id. at 18.
465 Id. at 18, 19.
466 Id. at 19, 20.
467 Id. at 20. Article 8 reads:

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

(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 freedom of others.

Convention, supra note 25.
by not writing to a solicitor in compliance with the Home Secretary's ruling, would lose the benefit of the protection of Article 8. The Government submitted that the right of correspondence is, in addition to the restrictions enumerated in Article 8(2), subject to implied limitations such as enunciated in Article 5(1)(a), dealing with persons lawfully detained after conviction by a competent court who necessarily are subject to consequences affecting the operation of other articles, including Article 8. The Court also rejected this argument, especially because it conflicted with the explicit text of Article 8(2), which by establishing definite exceptions to the principle of Article 8(1) left no room for implied exceptions.488

Finally, the Court contemplated whether the explicit conditions of Article 8(2) justified the Home Office's interference with the correspondence. The Court, taking up some of the express provisions of Article 8(2), admitted that the interference was "in accordance with the law" (the Prison Rules), and even accepted that the "prevention of disorder or crime" may justify somewhat wider measure of interference in the case of a convicted prisoner than in that of a person at liberty. The Government advanced this latter argument and the arguments of "public safety" and "the protection of the rights and freedoms of others." But the Court thought that, even given the discretionary power of the Contracting States, the facts emphasized by it with regard to Article 6(1) could not possibly justify any of the exceptions of Article 8(2) "necessary in a democratic society," especially as the applicant's correspondence with a solicitor would have been a preparatory step toward the exercise of the right of access to courts embodied in Article 6 of the Convention. The Court therefore concluded that there was also a violation of Article 8.469

By deciding that there were violations of the Convention, the question of affording just satisfaction under Article 50 was addressed by the Court. It stated that the question had been duly raised and was ready for decision. However, without further explanation, the Court found that it was not necessary to afford to the applicant any just satisfaction other than that resulting from the finding of a violation of his rights.470

469 Id. at 21, 22.
470 Id. at 22, 23.
The Court held there had been a breach of Article 6(1) and Article 8 and that the preceding findings amount in themselves to adequate just satisfaction under Article 50. 471

Judge Verdross dissented as to the violation of Article 6(1). From the Preamble and Article 1 of the Convention, he concluded that only rights and freedoms stated by the Convention in express terms or included in any of them are protected, and this was not the case as to the alleged right of access to the courts. The interpretation chosen by the Court ran, in his opinion, counter to the fact that the provisions relating to the protected rights and freedoms constitute limits on the jurisdiction of the Court, and this delimitation must be interpreted strictly. He believed that the States which have submitted to the Commission and the Court with respect to "certain" rights and freedoms "defined" in the Convention must be sure that these bounds will be strictly observed. Judge Verdross believed the only explanation of why the Convention refrained from formally stating the right of access to the courts was the fact that this right has been implanted for so long in the national legal order of the civilized states that there was no further need to guarantee it by the procedures under the Convention. Legal institutions presupposed by the Convention must, according to the Judge, be distinguished from the rights guaranteed by the Convention.472

Judge Zekia briefly concurred with the opinion as to the violation of Article 8 and the handling of Article 50,473 but dissented from the ruling on Article 6(1).474 He agreed that Articles 31, 32 and 33 of the Vienna Convention contain the guiding principles of the interpretation of a treaty. After stating Article 31(1), "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," he stated that he believed it necessary to consider text, context, and object and purpose in interpreting a treaty.

As to the text of Article 6(1) of the European Convention, he emphasized that it clearly deals only with court proceedings already instituted before a court. He did not think that the discrepancy between the French text, "contestation," and the English text

471 Id. at 23.
472 Id. at 24-25.
473 Id. at 31, 26.
474 Id. at 26-31.
would justify an alteration of his preceding statement.  

As to the context, the Judge stated that its examination will overlap the considerations of the object and purposes of the treaty. He argued against the Court's dealing with the relation between Article 6(1) and Articles 5(4) and 13. Extending this discussion to Article 17 (which forbids that any greater limitations be imposed upon the rights and freedoms set forth in the Convention than is provided in the Convention), he concluded from this that if a right of access is to be read into Article 6(1), it would have to be absolute, while the right of access in all civilized democratic societies is usually regulated by many norms and in various aspects. This, the Judge argued, showed that if the Convention intended to make the right of access an integral part of Article 6(1), the draftsmen would certainly have prescribed therein the restrictions and limitations attached to such right.

With regard to object and purpose, the Judge warned against underestimating the importance of Article 6(1), even if not comprising the right of access. He emphasized the words "the first steps" and "enforcement of certain Rights" in the Preamble of the Convention. He finally called attention to the fact that various other international declarations or treaties concerning human rights do contain provisions about access to courts, and saw in this a confirmation of the view that where a right of access to courts was intended to be incorporated in a treaty, it was done in express terms.

Judge Sir Gerald Fitzmaurice in Part One of his opinion dealt with the question of the violation of Article 8. He concurred with the Court that there was no obstacle to the application of Article 8 because no correspondence had actually started, but he disagreed with the Court's viewpoint that the wording of Article 8 ruled out the possibility of unexpressed but inherent limitations. He felt that respect for correspondence, which according to him is all that Arti-
Article 8(1) requires, is not equal to complete freedom of correspondence. Still, in conformity with the Court's attitude, he looked at the facts of the particular case and agreed that the Home Office's refusal was not necessary under any express or implied limitation of the right guaranteed by Article 8. He believed that the Home Office acted not for "necessity" reasons, but because it considered that the applicant's prospective claim was without basis. Therefore, he concurred in the Court's opinion that this question was not for the Home Office but for the courts to decide.

The second part of Judge Fitzmaurice's opinion dealt with his dissent as to the violation of Article 6(1). The Judge explained that a limine this was not a case to be contemplated under Article 6(1) but only under Article 8, for the reason that he could not see in the facts a denial of access to the courts but, at the most, a delay up to the time of the applicant's release. This he felt was not the same as a denial. The Judge, after stating that the text of Article 6(1) presupposes the factual existence of proceedings in which the express requirements of the article have to be applied, reverted to the argument of Judge Verdross that Article 1 only protects the rights and freedoms "defined" in the Convention which, according to Judge Fitzmaurice, would require at least a naming, if not an exact defining, of such rights or freedoms. He added that the notion of a right of access to the courts is ambiguous and that the lack of any definition in the Convention would mean, in case of recognition of such right as implied in Article 6(1), that it would have to be defined by the Court in each individual case. This he believed would be unacceptable to the State Members of the Convention.

Dissecting the Court's opinion, the Judge interpreted it to say that it is inconceivable that a Convention on human rights should fail to provide for a right of access to the courts, and that therefore it must be presumed to do so if such an inference is at all possible.

485 Id. at 35.
486 See text accompanying note 465 supra.
487 See text accompanying note 466 supra.
489 Id. at 40-63. This dissent is of approximately the same length as the judgment of the Court.
490 Id. at 40-42.
491 See text accompanying note 472 supra.
from any of its terms. He felt this attitude clearly was the basis for the Court's saying that it was inconceivable that Article 6(1) should establish procedural guarantees in a pending law suit without protecting the access to the courts. The Judge, in insisting that as to international agreements interpretation should be allowed only if necessary, believed that it is a perfectly conceivable situation that a right of access to the courts would be limited, but that where it is afforded there should be safeguards regarding the proceedings. He considered the only necessary interpretation of Article 6(1) was that it assumed a legal proceeding in progress. He believed the Court's attention to the Vienna Convention, to the Statute of the Council of Europe, etc., to be external to Article 6(1). He thought that the determining element in the Court's judgment was fear of the supposed consequences of a denial of a right of access to the courts and that this showed especially in the Court's statement that without this right a State could do away with its courts without acting in breach of the text of Article 6(1). He considered such conclusions as unrealistic or at best highly exaggerated, as illogical, and as typical of the attitude of the judicial legislator. These conclusions, in his opinion, should have little or no justification as to international agreements which derive their obligatory force exclusively from the consent of their parties.

Taking a different approach to the method of interpretation, the Judge first emphasized the newness of the unique feature of the Convention to submit the subject of human rights, formerly a most cherished preserve of domestic jurisdiction, to adjudication by an international court. From this he again deduced the necessity of a cautious and conservative interpretation. He quoted in this regard from the oral argument for the Government that it had no idea when it was accepting Article 6 that it was accepting an obligation to accord a right of access to the courts without qualification.

He then readily admitted that it is hardly possible to establish what really were the intentions of the contracting States as to the
point in controversy, but this, he thought, was another reason for not subjecting them to obligations which do not result clearly from the Convention. Without going into the history of the drafting of Article 6(1), he then examined provisions similar to this article found in other human rights instruments.  

Taking up the Universal Declaration of Human Rights, he quoted Articles 8 and 10. With regard to Article 8 of the Universal Declaration which he equates with Articles 5(4) and 13 of the Convention, he concurred with the Commission's and the Court's handling of these articles. He saw in Article 10 of the Universal Declaration the model from which Article 6(1) of the Convention was drawn. It too, he said, expressed no more substantive right of access to the courts than the parallel passage of Article 6(1) of the Convention. Thus, he thought, the two quoted articles established none of those rights which Article 6(1) was alleged to help enforce.

He then resorted to some international agreements younger than the Convention and concluded that their wording does not go beyond that of Article 6(1) of the Convention. Finally, he mentioned that both Article 8 of the Universal Declaration and Article 6(1) of the Convention, at one stage of their drafting, contained terms that might have been interpreted as providing for a right of access but that they had subsequently disappeared.

From this and his conviction that the Convention is to be interpreted conservatively, he concluded that the contracting States were content to rely de facto on the practice in all European countries of affording a wide measure of access to the courts without any definite intention of converting this into a binding international obligation, which, as the Court recognized, can not be generally defined.

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500 Id. at 54.
501 Id. at 54. Article 8 reads: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."
502 Id. at 55. Article 10 reads: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him."
503 See text accompanying notes 458, 459 supra.
505 Id. at 55-57.
506 See text accompanying note 499 supra.
507 See text accompanying note 452 supra.
Judge Fitzmaurice concluded this dissent with a renewed survey of all the provisions of the Convention that could possibly be of importance to the controversy. As to the Preamble, he recalled that it proclaims the intention to take the first steps for collective enforcement of "certain of the Rights" stated in the Universal Declaration. However, according to Judge Fitzmaurice, the Universal Declaration makes no provision for the right of access to the courts. Article 1, he reiterated, presupposes that the rights and freedoms to be protected must be "defined," while a right of access is not even mentioned, let alone "defined." Regarding Articles 5(4) and 13, the Judge basically agreed with the Court's finding.

Finally, the Judge took up Article 6(1). He emphasized the exclusively procedural character of Article 6(1) ejusdem generis, and claimed that, under the ejusdem generis rule, any implications drawn from the text for the purpose of importing into it something that is not actually expressed there should relate to something of the same order as figures in the text itself. Yet any right of access, though it has a procedural aspect, is basically a substantive right of a fundamental character.

He then claimed that the Court's interpretation of Article 6(1) also violated the rule of "expressio unius est exclusio alterius." He referred to the Court's statement that though Article 6(1) "does not state a right of access . . . in express terms," it "enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term." This, the Judge said, overlooked the fact that the only rights "enunciated" in Article 6(1) are not "distinct rights," but are all of the same category relating to the handling of the trial. Thus, nothing in the article constituted the pretended "single right" that is said to embrace the right of access in addition to the actually specified procedural rights. The explicit stating of the latter ones should call for the application of the expressio unius rule.

509 Id. at 58-63.
510 Id. at 58. See text accompanying notes 501-04 supra.
512 Id. at 59. See text accompanying notes 458-59 supra.
514 Id. at 60.
515 See text accompanying note 452 supra.
Next, the Judge pointed to the fact that Article 6(1) manifestly deals with both civil and criminal proceedings. Yet, he added, the question of access to the courts must arise primarily in civil proceedings since it would be absurd to speak of a right of access in criminal proceedings initiated by the public authority. He noted that special classes of criminal cases originated by private citizens would be a limited exception.\(^\text{517}\)

The Judge also criticized the Court for not defining more precisely the point of time from which the "reasonable time" of Article 6(1) should run\(^\text{518}\) since an _ad hoc_ determination in each case would consequently result in governments never knowing in advance within what precise period cases must be brought to trial.\(^\text{519}\)

Judge Fitzmaurice stated that everything relating to the right of access must concern the period prior to the formal initiation of proceedings since, once proceedings have begun, access to the courts has been had and the problem ceases to exist. Any alleged interference with or denial of access ought to relate, he thought, to the period "within a reasonable time" to which Article 6(1) refers. This, he concluded, shows that Article 6(1) did not propose to deal with access at all.\(^\text{520}\)

The Judge made a similar argument regarding the term "public hearing" in Article 6(1). He envisaged a case of civil proceedings where a hearing on the merits will occur if proceedings run their normal course. Yet, he noted that proceedings may be stopped at an earlier stage,\(^\text{521}\) where a judge may deal with preliminary questions "in chambers," and the case may be "struck out" as disclosing no cause of action. If the right of access were implied in Article 6(1), this might be held to involve a right to public hearing in all circumstances, since anything less would not constitute "access."\(^\text{522}\)

The Judge's final conclusion was that a right of access is not to be implied in Article 6(1) except by a process of interpretation of which he disapproved. He considered the the cure of this deficiency of the Convention to be a task the Court should not seek to carry out itself but should refer to the contracting States.\(^\text{523}\)

\(^{517}\) Id. at 61.

\(^{518}\) See text accompanying note 457 supra.


\(^{520}\) Id. at 62-63.

\(^{521}\) Cf. text accompanying note 465 supra.


\(^{523}\) Id.
The Golder Case appears to be a landmark among the decisions of the Court for the reason that through interpretation of Article 6(1), it affirms the existence of the right of access to the courts as one of the rights protected by the Convention, though its text does not say so in so many words. Both the majority of the Court and the dissenters used so impressive an array of arguments that it is not easy to find which ones are more convincing. On the one hand the spirit of the Convention pushes one in the direction of interpreting its provisions—so as not to unduly interfere with the internal sphere of law of the participating States—as meaning whatever assures the most satisfying effect to the rights clearly expressed in it. From this point of view, the idea that the rights expressly established in Article 6(1) as to the conduct of proceedings remains an empty shell if the proceedings cannot start for lack of a right of access to the courts. This is a strong argument that this latter right is implied in the article. Actually, all the further points made by the majority are only means to defend their main argument and to counter objections to it. The dissenters, especially Judge Fitzmaurice, try honestly to expose weaknesses of the majority’s main argument and the underlying subordinate arguments. The Judge enlists the wording of the Preamble of the Convention that says that certain of the Rights stated in the Universal Declaration of Human Rights should be actively enforced and then cites the absence of a right of access in the Universal Declaration because he does not see such a right in the words of its Article 8. Even if he should be right in this last statement, the majority’s insistence that the belief in the rule of law stressed in the Preamble of the European Convention was actually the drawing force toward collective enforcement possibly justified the implied inclusion of the right of access in the Convention. Impressively, Judge Fitzmaurice concluded from the words of Article 1 of the Convention, which oblige the Contracting Parties to guarantee the rights “defined” in the Convention, that the right of access cannot be included because it is not “defined” expressly in Article 6(1).

But is it impossible to define something by logical and clear implication? Difficulties may arise because both majority and dissenters feel that the right of access to the Court is not an unlimited right and will need closer scrutiny in the individual case. But this shortcoming is shared with many other rights and does not seem to be sufficient to exclude this right a limine. Without reiterating all
the arguments brought forward, the answer chosen by the majority seems tenable and within the spirit of the Convention.

P. National Union of Belgian Police Case

This case originated in an application against the Kingdom of Belgium lodged by the National Union of Belgian Police with the Commission on March 5, 1970, which declared it admissible on February 8, 1972. It reached the Court on October 7, 1974, upon referral by the Commission which requested the Court to decide whether or not the facts of the case disclosed a violation of Articles 11 and 14 of the Convention by the Kingdom of Belgium. As in the Golder Case, the competent Chamber of the Court by unanimous decision of April 12, 1975, relinquished jurisdiction to the plenary court according to Rule 48 of the Rules of the Court since the case raised serious questions affecting the interpretation of the Convention. The elected Judge of Belgian nationality who sat ex officio was Judge Ganshof van der Meersch. Procedurally, it is of some interest that the Court decided proprio motu, according to rules 38(1) and 48(3) taken together, to hear the Secretary General of the applicant union on certain questions of fact and for the purpose of information.

The facts of the case are fairly complicated since a large number of laws, ordinances, etc., concerning labor unions and their representations are involved. The applicant complained that the Government did not recognize it as one of the most representative organizations which alone the Ministry of the Interior is required to consult under the Act of July 27, 1961, which relates to such matters as staff structures, conditions of recruitment and promotion, pecuniary status and salary scales of provincial and municipal staff. The applicant, who was excluded from this consultation as regards both

526 Id. at 4, 6.
527 Id. at 6-7.
528 Section 9 of that Act reads: "The general arrangements to be made by the King . . . shall be decreed after consulting representatives of those organizations that best represent the staff of the provinces and municipalities . . . . The forms of such consultation shall be determined by the King." Police Union Case, [1975] 18 Eur. Ct. Human Rights 11.
questions of interest to all such staff and questions peculiar to municipal police, considered itself at a disadvantage compared with three other unions open to consultation as a whole as defined in a Royal decree of August 2, 1966. The applicant submitted that this provision greatly restricts its field of action, thereby tending to oblige the members of the municipal police to join the organizations considered to be "representative" but having a "political" character incompatible with the "special vocation" of the police. The applicant further maintained that the government had, on the other hand, agreed to take account of this special vocation in the case of the two other police forces which were subject to State authority, namely the criminal police attached to the prosecuting authorities and the gendarmerie. On these various points, the applicant relied on Article 11(1) of the Convention both on its own and in conjunction with Article 14.

The subject of the case in broad terms was the question whether the applicant was in violation of the Convention, excluded from consultation to the effect that it was put at a disadvantage compared with the other unions. The Court saw in Article 11(1) an

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229 Article 2(2) of that Decree reads: "Those organizations which are open to all staff of the provinces and municipalities and which protect such staff's occupational interests shall be deemed to be organizations most representative thereof.

Each such organization shall make itself known by sending to the Minister of the Interior by registered post, within forty days of publication of this Decree in the Moniteur belge, a copy of its articles of association and a list of its officers. The Minister of the Interior shall verify whether it complies with the conditions required and shall notify it of its decision."

Several trade unions concerned with civil servants, other than the applicant union, were recognized as meeting these criteria. Id. at 12.

520 Id. at 16-17. The applicant is open to all members of the municipal police, but members of the two State police forces may not belong to it. The number of the members of the applicant union declined steadily from 7,226 in 1961 to 5,748 in 1974. Id. at 8.

521 Article 11(1) reads: "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 interest." Id. at 17. Article 14 reads: "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." Id. at 19.

522 The Commission expressed in its Report the following opinion:
- unanimously, that the State, whether acting as "legislator" or "employer" assumes obligations within the scope of Article 11(1) of the Convention;
- by eight votes to five, that the right to consultation and, more generally, freedom to bargain collectively are important and even essential elements of trade union action falling within the scope of Article 11(1);
- by eight votes to five, that this right to consultation is not however unlimited, the limit being, in the case of the applicant union, the existence of an objective criterion...
assertion of freedom of trade unions as a special aspect of freedom of association. However, the Court noted that the article does not guarantee any particular treatment of trade unions or their members by the State, such as the right to be consulted by it. It emphasized that this latter right is neither mentioned in Article 11(1) nor generally incorporated by all the contracting States in their national law or practice, nor is it indispensable for effective union freedom. In short, it was not an element necessarily inherent in a right guaranteed by the Convention as distinguished from the "right to a court," embodied, according to the Golder judgment, in Article 6(1) of the Convention. 533 The Court called attention to the fact that trade union matters are dealt with in detail in the Social Charter of October 18, 1961, also drawn up within the framework of the Council of Europe. 534 Additionally, the Court observed that Article 6(1) of that Charter obliges the Contracting States "to promote joint consultation between workers and employers," but that this wording does not provide for an actual right of consultation. Still, the Court did not consider the words "for the protection of his interest" in Article 11(1) of the Convention simply redundant. The Court viewed the language as denoting purpose by showing that the Convention safeguards freedom to protect the occupational interests of trade union members by union action which the States have to make possible. Therefore the Court thought the union members have a right that the union be heard. Yet Article 11(1) certainly left each State a free choice of the means for unions to utilize, which could include consultation, the presentation of claims and pursuing the protection of members. The applicant, the Court said, did not allege that its steps were ignored by the Government and in these circumstances the mere fact that the Minister of the Interior did not

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533 Id. at 17, 18.
534 Id. at 17-18.
consult the applicant under the 1961 Act did not constitute a breach of Article 11(1) considered on its own.535

As to the alleged infringement of personal freedom to join or remain a member of the applicant union, the Court pointed to the fact that every member of the municipal police retained this freedom in spite of the 1966 Decree, even if a considerable decline in membership was partially caused as the applicant claimed by the disadvantage of the applicant as compared with other unions in a more favorable position. The Court said that this was caused by Belgium’s general policy of restricting the number of organizations to be consulted, but reiterated that this policy was not on its own incompatible with trade union freedom. The Court therefore denied a violation of Article 11(1).536

Though the Court came to this conclusion, it maintained that it had to ascertain whether the differences in treatment complained of by the applicant contravened Articles 11 and 14 taken together. It characterized Article 14 as having no independent existence, but as complementing the other provisions of the Convention and Protocols by safeguarding individuals or groups in comparable situations from discrimination in the enjoyment of the rights set forth. Thus, the Court concluded, a measure in conformity with a protected right or freedom may still violate the Article that protects that right or freedom when read in conjunction with Article 14 when it is of a discriminatory nature, especially where the right is, as here, not defined precisely but leaves the State a wide choice of the means for making the right effective.537

The Court referred to its finding that the subject matter of the disadvantage, namely consultation, is a principle left by Article 11(1) to the discretion of the contracting States but forms one of the methods of the right to be heard in the protection of the members’ interest. Belgium has instituted a system of consultation in its relations with provincial and municipal staff, as well as with its own officials, and has selected consultation in certain cases so that Article 14 is pertinent in the present situation.538

The Court, however, emphasized that not every distinction amounts to discrimination, that the principle of equality of treat-

535 Id. at 18. See text accompanying notes 69-76 supra.
536 Id. at 18-19.
537 Id. at 19.
538 Id. at 20.
ment is violated only if the distinction has no objective and reasonable justification in relation to the aim and effect of the measure under consideration in line with the principles prevailing in democratic societies. There must, however, be a reasonable relationship of proportionality between the means employed and the aim sought to be realized.539

In determining whether there was discrimination, the Court said it could not assume the role of the competent national authorities which may choose the measures they consider appropriate in matters governed by the Convention. The Court again stated the matter of the complaint, namely, that the applicant was not a body to be consulted like the three unions open to all provincial and municipal staff on proposals of interest to the municipal police, no matter whether such proposals concern all categories of municipal officials or particularly the police. The Court admitted that the 1966 Decree caused inequality to the detriment of "category-based" unions such as the applicant; it thought, however, that the Government's claim that it wished to avoid "trade union anarchy" and considered it necessary to ensure a coherent and balanced staff policy embracing the interest of all provincial and communal staff showed a legitimate aim and did not reveal other and ill intentioned designs of the 1966 Decree. It added that nothing indicated an intention to confer on the three large unions, on account of their political commitment, an exclusive privilege and that if there existed or were to exist a union without political leanings and open to all provincial and municipal staff protecting their occupational interests, the Decree would compel the Minister to consult it, too.540

The applicant had wondered how the Government could claim that it was in the general interest to avoid fragmentation of unions in matters connected with the municipal police while separating the union activities of the criminal police and recognizing a category-based apolitical union as the only organization representing members of the gendarmerie. The Court felt that Articles 11 and 14 do not oblige Belgium to set up a consultation system analogous to the one in operation for State officials (including members of the criminal police and of the gendarmerie) for the provincial and municipal staff, particularly the municipal police.541

539 Id.
540 Id. at 20, 21.
541 Id. at 21.
The Court then considered whether the disadvantages imposed upon the applicant in comparison with members of unions consulted under the 1961 Act were justified both in principle and in scope. The Court said that clearly as to consultation regarding question of a general nature which are of interest to all provincial and municipal staff, the regulation in the 1966 Decree is a proper means attaining the legitimate aim sought to be realized. Finally, the Court examined whether discrimination resulted from the further fact of denying applicant the right to consultation on matters that concern the municipal police alone, such as conditions for appointment to superintendent or deputy superintendent. The Court envisaged that special questions may also arise concerning other categories of provincial or municipal staff which, if they were to unite in category-based unions, would have no right to consultation either. Therefore, the Court thought it understandable that the Government did not feel bound to make exceptions which might in the end have robbed the 1966 Decree of all significance. The Court thought that the uniform nature of the rule did not justify the conclusion that the Government had exceeded the limit of what it was allowed to do in laying down the measures it deemed appropriate in its relations with the unions. It finished by saying that it had not been clearly established that the applicant's disadvantage was excessive in relation to the legitimate aim pursued by the Government and that therefore the principle of proportionality had not been offended.\textsuperscript{542}

After denying a violation of Article 11 or of Article 11 in conjunction with Article 14, the Court stated that the question of Article 50 of the Convention did not arise.\textsuperscript{543}

Judge Zekia reiterated in his dissent the general norms established by the majority as to the meaning of discrimination.\textsuperscript{544} He differed from the majority mainly in the evaluation of the facts in this regard. He was not impressed by the Government's claim that if consultation were extended to unions with category-based membership not embracing the total staff, chaos and anarchy was to be feared from proliferation of consultation. He felt that consultation with the applicant could not have been an addition to the self-

\textsuperscript{542} Id. at 21-22.
\textsuperscript{543} Id. at 22.
\textsuperscript{544} Id. at 24-27. See text accompanying notes 539-40 supra.
understood right of communication and submission of claims large enough to inconvenience the Government greatly. He concluded that there was neither reasonable justification nor reasonable relationship of proportionability in withholding consultation from the applicant.

The three joint dissenters, Judges Wianda, Ganshof van der Meersch, and Binschedler-Robert, emphasized the point (which Judge Zekia had also noted) that the 1966 Decree gave protection in so far as consultation covered questions of a general nature of interest to all provincial and municipal staff but not matters peculiar to the municipal police. (Such peculiar matters are numerous and important for the applicant since the police in its various functions (administration and crime prevention versus criminal investigation) is subject to separate authorities (local-State).) The responsible authorities had recognized the special situation by making various regulations valid only for the municipal police. The dissenting Judges found, therefore, that the Government should consult (under Articles 11(1) and 14 in conjunction) the applicant in which the persons interested combine and that this would not lead to any real danger of “trade union anarchy.” They concluded that the disadvantage suffered by the members of the applicant by reason of the inflexible character of the 1966 Decree was not justified and necessarily entailed discrimination.545 It should be mentioned here that Judge Fitzmaurice would have shared this joint separate opinion had he not considered Article 14 irrelevant in this case.546

Judge Fitzmaurice’s separate opinion, as far as it refers to the question of violation of Articles 11 and 14 in conjunction, centers around this basic thesis: Article 14 applies only to the “enjoyment of the rights and freedoms set forth in this Convention” which is to be “secured without discrimination.” As the majority rightly has found that the right to form and join trade unions for the protection of the members’ interests does not comprise any right of trade unions to be consulted by authorities, then a right of consultation is not one of “the rights and freedoms set forth in the Convention” and the issue of discrimination becomes irrelevant.547 Judge Fitzmaurice considered the reasoning of the majority incorrect and also held the

546 Id. at 30.
547 Id. at 37-44.
Court's judgment in the *Belgian Language Case*\(^5\) which the majority had cited as precedent for its decision to be wrong. He suggested that the Court, not bound by precedent, should have corrected its former mistake.\(^5\)\(^4\) To clarify the difference between his viewpoint and that of the Court he quoted a passage from the Court's judgment in the *Belgian Language Case*:

> To recall a further example . . . Article 6 of the Convention does not compel States to institute a system of appeal courts. A State which does set up such courts consequently goes beyond its obligations under Article 6. However, it would violate that Article, read in conjunction with Article 14, were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of [legal] actions. In such cases there would be a violation of a guaranteed right or freedom as it is proclaimed by the relevant Article read in conjunction with Article 14. It is as though the latter formed an integral part of each of the Articles laying down rights and freedoms.\(^5\)\(^0\)

Emphasizing that the "the Court is not a court of ethics but a court of law," Judge Fitzmaurice considered this train of thought attractive for moral reasons but incompatible with the wording of the Convention.

It is not easy to say whether the majority or the four dissenters who found discrimination in the Government's attitude were right. The evaluation of the facts with regard to "reasonable justification and reasonable relationship of proportionality" is hampered by borderlines that are difficult to trace. Perhaps one can say that the dissenters focused their attention too much on the special situation of the applicant and did not sufficiently consider a possible proliferation of category-based unions.

Judge Fitzmaurice's elaboration is, as in the *Golder Case*, most detailed and challenging. Yet again, as in the *Golder Case*, it appears to cling too much to form and not enough to substance. He overlooked, it seems, that Article 14 speaks not of rights and freedoms set forth in the Convention but of their enjoyment to be secured. This concept is wider and underpins the idea expressed by

\(^{5,48}\) See text accompanying notes 163-65 supra.
\(^{5,50}\) Id. at 40-41.
\(^{5,51}\) Id. at 43.
the Court so well in the passage from the Belgian Language Case quoted by Judge Fitzmaurice himself.\textsuperscript{552}

IV. CONCLUSION

Between July 5, 1955, the date on which the right of individual petitions became effective, and the end of 1975, 7313 such applications and 14 interstate applications were lodged with the Commission.\textsuperscript{553} Out of this number, 131 individual and 13 interstate applications were declared admissible.\textsuperscript{554} Only 144 applications could ultimately have reached the Court. If one considers this fact, it is not too surprising that the Court ever since its coming into being in 1958\textsuperscript{555} has been seized only with the small number of cases dealt with in this survey. Roughly 10 percent of the applications by individuals declared admissible by the Commission were handled by the Court through 1975, though it had no dealing with any interstate case.\textsuperscript{556}

In this small number of cases, the Court has had the opportunity to deal with a great variety of procedural problems and some important substantive issues. This is easily explained by the fact that the Convention for the first time established a truly judicial international process to deal with violations of the human rights guaranteed by it. The Court has earnestly tried to solve these questions in a way that best serves the lofty purposes of the Convention without unduly interfering with the sovereign rights of the States involved. It is to be hoped that its services will be used in an increasing number of cases.

\textsuperscript{552} The Court's viewpoint is apparently accepted also by F. Jacobs, The European Convention on Human Rights 188-90 (1975).


\textsuperscript{554} Id.

\textsuperscript{555} See note 62 supra.

\textsuperscript{556} At least two other non-interstate cases were pending before the Court at the time of this writing. Police Union Case, [1975] 18 Eur. Ct. Human Rights 31 n.3. Any judgments rendered in them have not yet become available.
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